

# FROM PROPERTY TO PERSONHOOD: WHAT THE LEGAL SYSTEM SHOULD DO FOR CHILDREN IN FAMILY VIOLENCE CASES

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## I. INTRODUCTION

Quite simply, abuse by a family member inflicted on those who are weaker and less able to defend themselves—almost invariably a child or a woman—is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security, free from the fear that brute force will determine the conditions of one's daily life. . . . Particularly for children the sense that the place which is supposed to be the place of security is the place of greatest danger is the ultimate denial that this is a world of justice and restraint, where people have rights and are entitled to respect.<sup>1</sup>

I am helping Brad Wells with his language arts homework. He is currently learning about verb tenses—past, present, and future. Brad and I are sitting in the front room of his mother and stepfather's house. In other parts of the house, his younger sister is playing with the cat; his mother is making dinner; his stepfather is watching television.

I am also trying to elicit information from Brad about the incident that has brought me here as Brad's *guardian ad litem*. One Saturday, Brad's father brought him home from a regularly scheduled visit and demanded to speak with Brad's stepfather about a punishment that he felt was inappropriate. The exchange between the two men grew angry. When Brad's mother came to take Brad into the house, Brad's father stepped in her way and refused to let Brad leave. Brad stood on the porch, forced to watch the ensuing altercation, during which Brad's father beat his mother with an umbrella so severely that the umbrella broke. This incident was just the latest episode in a pattern of violence against both Brad and his mother stretching back to before the couple's divorce several years earlier.

Brad is, according to his mother, normally a bright, happy-go-lucky child, but this incident has left him shaken and reticent. He answers my questions reluctantly and with a slight stutter, confirming that his father beat his mother and that he had been forced to watch the entire incident. Then he turns away, back to the homework that shields him from any further questioning. As he turns away, I think about Brad's past, present, and future: the past history of physical abuse of his mother, the present conflicting mix of feelings, from anticipation to dread, that Brad has about seeing his father, and the future prospects for this child, who has been exposed to so much turmoil at so young an age. I will continue to spend time with Brad over the next year, working on homework, playing with his model airplanes, helping him to process his misgivings about his father—and representing him in the court proceedings in which his mother and father are enmeshed. Brad, no less than his mother, is a victim of domestic violence.

It has almost become trite to declare that violence against women is an

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Custody of Vaughn, 664 N.E.2d 434, 437 (Mass. 1996).

epidemic in the United States.<sup>2</sup> The figures bear out that assertion: one in three women is assaulted physically by her partner.<sup>3</sup> Each year, four million women are seriously assaulted by their partners.<sup>4</sup> In 1993, 575,000 men and 49,000 women were arrested for offenses involving domestic violence.<sup>5</sup> In the same year, 1300 women were killed by their partners or former partners.<sup>6</sup> Violence has become a commonplace way of resolving family conflict; in one survey, nearly forty percent of the mothers attending a hospital clinic reported that violence was used as a means of resolving family disagreements.<sup>7</sup> Despite these amazingly high numbers, experts believe that family violence is significantly underreported.<sup>8</sup>

Leaving a batterer does not stop domestic abuse; in fact, just the opposite is true. Divorced and separated women report being battered fourteen times as often as women who are still with their abusers, and seventy-five percent of the battered women who are killed by past or present partners are women who are divorced or separated.<sup>9</sup> Nor does having the batterer seek treatment alleviate the problem. Substantial numbers of batterers continue to physically abuse their current partners within six to twelve months after completing counseling.<sup>10</sup> One half of batterers who are "successfully" treated commit acts of physical violence against their new partners.<sup>11</sup> Virtually all batterers who complete treatment programs continue to psychologically abuse their partners.<sup>12</sup>

The concept of family violence encompasses more than simply violence against women. Where one form of violence is present in a relationship, the

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<sup>2</sup> The majority of victims of domestic violence (95% by some estimates) are women. See Philip C. Crosby, Comment, *Custody of Vaughn: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B.U. L. REV. 483, 493 (1997). Moreover, attacks by men on women are more numerous and more severe than those perpetrated by women. See *id.* For the purposes of this article (and despite the fact that the author has represented, albeit rarely, battered men) victims of domestic violence will be referred to as female, and batterers as male.

<sup>3</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, VIOLENCE AND THE FAMILY: REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 10-11 (1996).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See Marilyn Augustyn et al., *Children Who Witness Violence*, 12 CONTEMP. PEDIATRICS 35, 39 (1995).

<sup>8</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 13; but see Armin A. Brott, *Battered-Truth Syndrome: Hyped Stats on Wife Abuse Only Worsen the Problem*, WASHINGTON POST, July 31, 1994, at C1 (arguing that statistics on battered women in America are vastly inflated).

<sup>9</sup> See Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1115 (1996) [hereinafter Zorza, *Protecting the Children*].

<sup>10</sup> See Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations* (last visited 3/9/00) <<http://www.vaw.umn.edu/vawnet/custody.htm>>.

<sup>11</sup> See Zorza, *Protecting the Children*, *supra* note 9, at 1114.

<sup>12</sup> See *id.*; see also Saunders, *supra* note 10, at 4.

likelihood increases that other forms of violence are present within the family as well.<sup>13</sup> There is a significant overlap, for example, between partner abuse and child abuse and neglect.<sup>14</sup> Surveys suggest that over half of men who abuse their partners also abuse their children.<sup>15</sup> Batterers use children to hurt their former partners. Thirty-four percent of batterers threaten to kidnap their children (and eleven percent actually do), and twenty-five percent threaten to harm their children.<sup>16</sup> Although batterers are generally responsible for the majority of child abuse within these families, battered women are more likely to abuse and/or neglect their own children.<sup>17</sup> In fact, women are eight times more likely to abuse their children when they are being battered.<sup>18</sup> Child abuse and neglect are more prevalent in homes where violence against women exists, because battering impairs the parenting skills of the abused mother, making the child less likely to receive proper care from either parent.<sup>19</sup> Abused mothers are likely to experience fear and depression, leaving them less nurturing and supportive of their children.<sup>20</sup> Domestic violence actually undermines the mother's ability to parent; "[a]buse creates dysfunction and disorganization, leaving children with little nurturance, support, structure or supervision."<sup>21</sup> Abuse towards children decreases when battered women leave abusive relationships, both because the mother is less likely to abuse her children after leaving the relationship and because the children are no longer subject to abuse by the batterer.<sup>22</sup>

Family violence is especially damaging because of the context within which it takes place: it "occurs within ongoing relationships that are expected to be

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<sup>13</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 3.

<sup>14</sup> See Crosby, *supra* note 2, at 503; Susan Griffin, *The Children's Law, Policy, and Practice: Conference Report* (last modified September 14-16, 1995) <<http://www.realsolutions.org/childcon.htm>>; see also Robert Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229, 232 (1995).

<sup>15</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 80; Saunders, *supra* note 10, at 2; Zorza, *Protecting the Children*, *supra* note 9, at 1115. One study sets the figure at 70%. See, e.g., Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 164 (Kersti Yllo & Michelle Bogard, eds. 1988). Many of these men also sexually abuse their children. See Zorza, *Protecting the Children*, *supra* note 9, at 1115.

<sup>16</sup> See Zorza, *Protecting the Children*, *supra* note 9, at 1116.

<sup>17</sup> See *id.*

<sup>18</sup> See David Peterson, Comment, *Judicial Discretion Is Insufficient: Minors' Due Process Right to Participate with Counsel When Divorce Custody Disputes Involve Allegations of Child Abuse*, 25 GOLDEN GATE L. REV. 513, 521 (1995) (citing LENORE WALKER, *THE BATTERED WOMAN SYNDROME* (1984)).

<sup>19</sup> See Crosby, *supra* note 2, at 499.

<sup>20</sup> See Saunders, *supra* note 10, at 3.

<sup>21</sup> Crosby, *supra* note 2, at 504.

<sup>22</sup> See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1057 (1991); see also Saunders, *supra* note 10, at 2; Zorza, *Protecting the Children*, *supra* note 9, at 1116.

protective, supportive and nurturing.”<sup>23</sup> The harm done to children when these relationships are undermined—both children who have suffered violence and children who have witnessed violence—is especially acute and often overlooked. Although we have made tremendous strides in acknowledging the epidemic of domestic violence in the United States, and in creating programs and systems that are responsive to the needs of the adult victims of domestic violence, the damage done to children in these abusive home settings is often an afterthought. To the extent that the legal system has recognized the unique problems for children in households where there is domestic violence, its concern has been memorialized in laws creating presumptions against awarding custody to an abusive parent. Although these laws, when enforced, are certainly helpful to both adult and child victims, they do not even begin to meet the needs of battered children and child witnesses to violence.

Failing to meet the needs of these children will have dire consequences, as will be detailed in Section II. Section II will discuss the short and long term impact of witnessing domestic violence on the physical and psychological well-being of children. Section II will also examine some of the coping strategies used by child witnesses.

Once their families’ problems move beyond the walls of the home and into the legal system, children are cast in various roles. Often, the needs and rights of children are ignored as their parents negotiate the legal system. Section III will discuss the role of children as “property,” specifically, the property of their parents. It will discuss the various types of laws designed to address issues of domestic violence in the context of custody and visitation and will discuss problems with the implementation of these laws. Section III will also examine the “right” to visitation and suggest strategies that balance the interests of children and parents.

Section IV will look at children as “witnesses,” as participants in the legal proceedings in which their parents are involved, and will examine statutory and procedural strategies for making the act of serving as a witness less painful for the children involved. Finally, Section V will consider children as “persons,” discussing how representation for children can help to ensure that children’s rights are safeguarded in court proceedings. Section V will also outline how the provision of supportive services, such as counseling, is crucial to ensuring the long term health and well-being of children whose lives have been shaped by the violence in their homes.

## II. THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN

### A. *Scope of the Problem*

Literally millions of children—estimates range from three to ten million

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AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 5.

yearly—witness physical violence between their parents.<sup>24</sup> As many as eighty-seven percent of children in homes where there is domestic violence witness that violence between their parents.<sup>25</sup> One study found that sixty-two percent of family violence cases involved the parent of a child under seventeen years of age.<sup>26</sup> Children witness about half of all violent incidents that occur between their parents.<sup>27</sup>

### B. Redefining "Witness"

Redefining "witnessing" is the key to understanding these inconceivably large numbers. Parents often minimize children's exposure to violence or deny that their children are harmed by the violence in their homes.<sup>28</sup> In part, this denial reflects the parents' mechanisms for coping with the stress accompanying the violence.<sup>29</sup> But parents may also be genuinely unaware of the ages at which children begin to receive and interpret information. For example, verbal memory (the ability to perceive an event and describe it) begins at approximately twenty-eight to thirty-six months of age, far earlier than most parents expect their children to accurately recall and describe events.<sup>30</sup> Moreover, parents are not aware of the myriad ways in which children can witness violence. Parents assume that children have not witnessed the violence because the children were asleep, outside, or in another room, but children often provide detailed descriptions of events about which parents assume that their children are ignorant.<sup>31</sup> In one study, thirty-six percent of children described violence by their fathers against their mothers where at least one of the parents reported either that the children had not witnessed the

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<sup>24</sup> See Alan Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 L. AND PSYCHOL. REV. 137, 139 (1994) (estimating three million child witnesses yearly); see also HOWARD DAVIDSON, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 1* (1994) (between three and ten million witnesses annually) [hereinafter DAVIDSON, IMPACT]; Augustyn et al., *supra* note 7, at 36 (citing results of 1985 National Family Violence Survey with estimate of ten million child witnesses annually); Griffin, *supra* note 14, at 1 (between three and ten million witnesses annually); Gabrielle M. Maxwell, *Children and Family Violence: The Unnoticed Victims*, (last visited 3/9/00) <<http://www.mincava.umn.edu/papers/nzreport.htm>> (between three and ten million witnesses annually).

<sup>25</sup> See DAVIDSON, IMPACT, *supra* note 24, at 1; see also Tomkins et al., *supra* note 24, at 139-40; Griffin, *supra* note 14, at 1.

<sup>26</sup> See Maxwell, *supra* note 24, at 10.

<sup>27</sup> See Tomkins et al., *supra* note 24, at 139-40. These findings have been replicated in a study of children from violent homes in New Zealand. A study of women seeking refuge at battered women's shelters in New Zealand found that 90% of the children in the shelter had witnessed violence between their parents. See Maxwell, *supra* note 24, at 1.

<sup>28</sup> See Augustyn et al., *supra* note 7, at 40; Crosby, *supra* note 2, at 499-500.

<sup>29</sup> See Augustyn et al., *supra* note 7, at 40.

<sup>30</sup> See *id.*

<sup>31</sup> See Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. OF INTERPERSONAL VIOLENCE 843-44 (1999).

violence or that no violence had occurred.<sup>32</sup>

What does it mean to “witness” violence? Witnessing includes not only what a child sees during an actual violent event, but also what the child hears during the event, what the child experiences as part of the event, and what the child sees during the aftermath of the event.<sup>33</sup> During a violent incident, children hear threats and objects breaking.<sup>34</sup> They hear their mothers screaming or crying or begging. Moreover, children may be a part of the violent event. Batterers often use the children as pawns, hitting or threatening to hit the children, taking them hostage, or forcing a child to watch or participate in the abuse.<sup>35</sup> Children may also become active participants in the event, attempting to intervene between parents or seek help for the battered parent.<sup>36</sup> A child may be held in the mother’s arms during the violent event.<sup>37</sup> And children witness the aftermath of violent events: seeing a parent’s battered or bloodied face, watching as a parent is interviewed or apprehended by the police, moving with a parent to a shelter to escape further violence.<sup>38</sup> All of these forms of witnessing can have the same detrimental impact on children as actually watching an event take place. In some cases, the impact can be more damaging; when children cannot see what is taking place, they may imagine scenarios that are scarier and more violent than the events that actually occur.

### C. *The Impact of Witnessing Family Violence*

Social scientists, courts and commentators have come to recognize how destructive witnessing violence in the home can be for children. As Chief Justice Workman of the Supreme Court of West Virginia wrote in *Patricia Ann S. v. James Daniel S.*,

spousal abuse has a tremendous impact on children. “Children learn several lessons in witnessing the abuse of one of their parents. First, they learn that such behavior appears to be approved by their most important role models and that the violence toward a loved on is acceptable. Children also fail to grasp the full range of negative consequences for the violence

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<sup>32</sup> See *id.* at 5.

<sup>33</sup> See *id.* at 1-2.

<sup>34</sup> See Saunders, *supra* note 10, at 3.

<sup>35</sup> See Edleson, *supra* note 31, at 841.

<sup>36</sup> Survey results from New Zealand indicate that in 15% of cases children actively attempted to prevent the violent event, in 6% of cases children got help, and in 10% of cases children directly intervened in the violent event. Some of the children who became involved in the event were abused verbally or physically. See Maxwell, *supra* note 24, at 8.

<sup>37</sup> See Edleson, *supra* note 31, at 841.

<sup>38</sup> See *id.*



behavior and observe, instead, the short term reinforcements, namely compliance by the victim."<sup>39</sup>

The scope of the damage that is done to children who witness violence is vast. One commentator asserts that "[t]here is no doubt that children are harmed in more than one way—cognitively, psychologically, and in their social development—merely by observing or having the domestic terrorism of brutality against a parent at home."<sup>40</sup> The problems that are caused by witnessing violence are so serious that exposure to domestic violence has been called a "severe form of child abuse."<sup>41</sup> The domestic violence prevention program in Quincy, Massachusetts, one of the country's most progressive programs, provides lectures for survivors of domestic violence on the impact of witnessing violence on children, believing that sharing this information "may be the impetus for many women to pursue a course of action against their batterer."<sup>42</sup>

The effects of witnessing domestic violence are strikingly similar to the effects of being abused. Because there are significant numbers of children who are both maltreated and witnesses to domestic violence, it can be difficult to distinguish the effects of being maltreated from the effects of witnessing.<sup>43</sup> The effects of violence are bad for children who witness violence, worse for direct victims of child maltreatment, and worst for children who both witness and are the direct victims of family violence.<sup>44</sup> Children who both witness abuse and are abused get the "double whammy;" both researchers and the children they study agree that those who both witness and are abused suffer the most.<sup>45</sup> It is important to note, nonetheless, that solely witnessing violence still accounts for a significant degree of childhood distress.<sup>46</sup>

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<sup>39</sup> 435 S.E.2d 6, 18 (W. Va. 1993) (quoting Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse Is Charged*, 27 JUDGES J. 8, 11 (1998) (footnotes omitted).

<sup>40</sup> DAVIDSON, IMPACT, *supra* note 24, at 1.

<sup>41</sup> Saunders, *supra* note 10, at 2. For the purposes of domestic protection orders in New Zealand, violence is defined to include psychological violence, and childhood exposure to domestic violence is explicitly included in the characterization of psychological violence. See Maxwell, *supra* note 24, at 12.

<sup>42</sup> Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 347 n.99 (1994). The lecture is now given towards the end of the six week series because presenters found that when they gave this lecture in the beginning of the series, women felt tremendous guilt and shame for exposing their children to such negative environments and, believing that they were perceived as "bad mothers," dropped out of the program. See *id.*

<sup>43</sup> See Tomkins et al., *supra* note 24, at 146 n.42.

<sup>44</sup> See Lynne R. Kurtz, Comment, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1350 n.38 (1997).

<sup>45</sup> See Edleson, *supra* note 31, at 861-62.

<sup>46</sup> See *id.* (explaining that to be included in article analyzing a number of studies of children who witnessed violence, researchers had to have separated children who were physically abused from those who

There is broad agreement that children who witness violence are gravely harmed. The types of harm done to children who witness violence can be grouped into four categories: physical, behavioral and emotional, cognitive, and long-term harm.<sup>47</sup>

### 1. Physical Harm

The physical harm done to children who witness violence frequently starts before they are born. Battering often begins or increases during a woman's pregnancy.<sup>48</sup> Nearly fifty percent of batterers beat their pregnant wives or partners; as a result, these women are four times more likely to bear low birth-weight infants.<sup>49</sup> Astonishingly, more babies are born with birth defects as a result of their mothers being battered than as a result of all the diseases and illnesses for which pregnant women are immunized combined.<sup>50</sup>

Children who witness violence present with increased numbers of health problems—both actual and psychosomatic. These children are admitted to hospitals twice as often as other children, have an increased number of psychosomatic complaints, and are more frequently absent from school due to health problems.<sup>51</sup> Infants and younger children exposed to domestic violence suffer from generally poor health, insomnia (and a fear of going to bed triggered by the connection between being in bed and hearing abuse), and excessive screaming.<sup>52</sup> Other somatic complaints common to children who witness violence include headaches, stomachaches, diarrhea, asthma, and peptic ulcers.<sup>53</sup>

Children are also both inadvertently and deliberately hurt in the course of

"only" witnessed).

Edleson cautions, however, against assuming that *all* children suffer as a result of witnessing violence. In fact, he states, large numbers of children in these studies showed no developmental problems. *Id.* at 866.

<sup>47</sup> See Edleson, *supra* note 31 at 846. Edleson notes that the studies on the impact of witnessing domestic violence have weaknesses and gaps. These problems include definitional problems (separating children who are actually abused from those who solely witness), skewed samples (most of the studies are of children residing in shelters, who likely have higher stress levels as a result of their living situations), source problems (researchers rely on the mother's reports), measurement problems (the use of one standardized measure, the Child Behavior checklist, excludes other possible variables), and design defects, creating the ever-present social science conflict between correlation and causation. See *id.* at 844-45.

<sup>48</sup> See Cahn, *supra* note 22, at 1047.

<sup>49</sup> See DAVIDSON, IMPACT, *supra* note 24, at 1.

<sup>50</sup> See *id.*

<sup>51</sup> See Suzanne Kerouac et al., *Dimensions of Health in Violent Families*, 7 HEALTH CARE FOR WOMEN INT'L 413-26 (1986); G. Larson & M. Anderson, *Violence in the Family: Morbidity & Medical Consumption*, 16 SCANDINAVIAN J. OF SOC. MED. 161-66 (1988).

<sup>52</sup> See Tomkins et al., *supra* note 24, at 145; see also Bonnie Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1113-14 (1995).

<sup>53</sup> See Augustyn et al., *supra* note 7, at 40; Kurtz, *supra* note 44, at 1351 n. 40; Rabin, *supra* note 52, at 1113.

family violence. As noted previously, the overlap between child maltreatment and partner abuse is significant.<sup>54</sup> One study of one thousand battered women found that children were being abused in seventy percent of those homes.<sup>55</sup> Conversely, in an estimated seventy percent of cases where an abused child dies, there is ongoing violence against the mother.<sup>56</sup> Sexual abuse is also prevalent among these families; daughters are six times more likely to be sexually abused in homes where wife abuse is also occurring.<sup>57</sup>

Reckless violence targeted at parents can cause physical injuries to children.<sup>58</sup> Younger children are most seriously injured during battering incidents: children being held by mothers may be hit by blows meant for the mother, for example, or struck by flying objects (e.g., a chair) meant to hit the mother.<sup>59</sup> One study found that in sixteen percent of the cases where children were present during battering incidents, they were injured; in three percent of the cases, children were the primary objects of the violence.<sup>60</sup> Older children, in contrast, are often unintentionally injured when trying to protect their mothers.<sup>61</sup> In Palm Beach County, Florida, a child was killed while trying to wrestle a gun away from his father, who had been drinking and waving the gun around. The father had previously been found guilty of domestic battery, and police had been called to the family home six times between 1997 and the boy's death in November 1998, at least once because of "domestic trouble."<sup>62</sup>

Perhaps most troubling, however, is the knowledge that the estimates of rates of violence against children in homes where partner abuse occurs are probably low. Generally, information about violence against children in these homes is only reported because the police are investigating an assault against one of the parents. "The fact that there were so many cases where the violence towards children during these incidents remained in the background, raises the question of how much more violence towards children goes unrecorded."<sup>63</sup>

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<sup>54</sup> See *supra* notes 13-22, and accompanying text.

<sup>55</sup> See Peterson, *supra* note 18, at 521.

<sup>56</sup> See Rabin, *supra* note 52, at 1111.

<sup>57</sup> See Peterson, *supra* note 18, at 521.

<sup>58</sup> See Zorza, *Protecting the Children*, *supra* note 9, at 1115.

<sup>59</sup> See Maxwell, *supra* note 24, at 9; Zorza, *Protecting the Children*, *supra* note 9, at 1115. See also MARIA ROY, CHILDREN IN THE CROSSFIRE 89-90 (1988) (explaining that youngest children sustain the most serious injuries, including concussions and broken bones).

<sup>60</sup> See Maxwell, *supra* note 24 at 9.

<sup>61</sup> See Zorza, *Protecting the Children*, *supra* note 9, at 1115; see also ROY, *supra* note 59, at 92 (citing study of 146 children aged 11-17; study showed that all of the sons over the age of 14 attempted to protect their mothers from attacks; 62% were injured in so doing).

<sup>62</sup> Matt Mossman, *Boy Shot In Fight With Dad Had Become Model Student*, PALM BEACH POST, November 3, 1998, at 3B.

<sup>63</sup> Maxwell, *supra* note 24, at 11.

## 2. Behavioral and Emotional Harm

Violence “often is learned behavior” and “much of that learning takes place in the home.”<sup>64</sup> Exposure to violence is tantamount to psychological maltreatment by the abuser, and this “secondary victimization” carries many of the same symptoms as being the direct victim of a violent act.<sup>65</sup> Batterers use psychological tactics to isolate their partners and children from the outside world in order to exert control over the family and to prevent children from seeking outside assistance to stop the violence.<sup>66</sup> Exerting psychological control can decrease or eliminate the need to use physical violence. The greater the abuser’s power within the family, the greater the likelihood that the victim’s fear will far outlast the act of violence itself.<sup>67</sup>

The types and range of psychological harm that result from witnessing violence are overwhelming. Children who witness can suffer from post-traumatic stress disorder (PTSD); depression; dissociative, anxiety and mood disorders; suicidal ideation; extreme crying, fear, passivity and dependency; aggressiveness; and impulsivity.<sup>68</sup> Three factors increase the likelihood that child witnesses, who are more susceptible than adults, will suffer from PTSD: close proximity to the violent act; close relationships with the perpetrator and the victim; and the perception of themselves as being vulnerable to injury.<sup>69</sup> Guilt, shame and confusion are also common for these children, as are conflicts of loyalties.<sup>70</sup> Children experience a range of emotions about their parents. Towards the mother, the children may feel fear for her safety, guilt about their inability to intervene to stop the violence, and anger for her failure to escape the violence (or to protect them from the violence).<sup>71</sup> The child’s relationship with the father is equally confusing; children express both affection and resentment towards their fathers, as well as pain and disappointment about his behavior.<sup>72</sup> More distressing, children may begin to identify with the power of the abuser and distance themselves from the weaker parent, perceiving that parent as “unfit.”<sup>73</sup>

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<sup>64</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 17.

<sup>65</sup> *See id.* at 9, 70-71; *see also* Tomkins et al., *supra* note 24, at 144.

<sup>66</sup> *See* Crosby, *supra* note 2, at 496.

<sup>67</sup> *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 5.

<sup>68</sup> *See id.* at 9; *see also* Edleson, *supra* note 31, at 846-61; Kurtz, *supra* note 44, at 1351 n.40.

<sup>69</sup> *See* Crosby, *supra* note 2, at 503. One study of children suffering from PTSD found that witnessing domestic violence was as traumatic as being the victim of sexual abuse. *See* Augustyn et al., *supra* note 7, at 41.

<sup>70</sup> *See* Maxwell, *supra* note 24, at 10; Tomkins et al., *supra* note 24, at 147.

<sup>71</sup> *See* Saunders, *supra* note 10, at 3.

<sup>72</sup> *See* Edleson, *supra* note 31, at 863.

<sup>73</sup> *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 25; *see also* Martha McMahon & Ellen Pence, *Doing More Harm Than Good? Some Cautions on Visitation Centers*, in *ENDING THE CYCLE OF*

Disturbed emotional and behavioral development is typical in children who witness, although the damage varies with the age and the gender of the child.<sup>74</sup> For example, boys are thought generally to become more aggressive and girls more passive as a result of witnessing,<sup>75</sup> although there is some evidence that as they age, girls too display aggressive tendencies.<sup>76</sup> Children who become aggressive may be reacting to the stress of witnessing violence or modeling behavior that they have learned through witnessing.<sup>77</sup> Children who witness may also display borderline to severe behavioral problems and below average adaptive behavior skills.<sup>78</sup> They can be disruptive, impulsive and irritable.<sup>79</sup> These children also become "hyper-alert," ready to react to the slightest indication of trouble; because maintaining this state of "hyper-alertness" drains children of energy, it can cause distraction and persistent exhaustion.<sup>80</sup>

Children who have witnessed domestic violence have an increased sense of fatalism.<sup>81</sup> Exposure to violence changes the way that children view the world and their place within it. They see the world as a dangerous and unpredictable place and believe they are likely to die at an early age, which decreases their concern for their personal safety.<sup>82</sup> Their sense of imminent doom pushes these children towards behavior that increases their risk of injury or death, like drinking, using drugs, or using weapons.<sup>83</sup> Children who witness also have increased rates of suicide.<sup>84</sup>

Not surprisingly, child witnesses have lower social competence than children who have not witnessed violence.<sup>85</sup> Their tendencies toward violence and aggression make them less likely to resolve interpersonal conflict in a constructive

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VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 201 (Eniat Peled, Peter G. Jaffe & Jeffrey L. Edleson eds., 1995). For example, in *Custody of Vaughn*, 664 N.E.2d 434 (Mass. 1996), one expert testified that the child had developed negative opinions of the mother as a result of the father's abuse. The child's perceptions were largely derived from the father's negative statements about the mother. See Crosby, *supra* note 2, at 490.

<sup>74</sup> See Tomkins et al., *supra* note 24, at 144.

<sup>75</sup> See Kurtz, *supra* note 44, at 1351.

<sup>76</sup> See Edleson, *supra* note 31, at 862.

<sup>77</sup> See Augustyn et al., *supra* note 7, at 40.

<sup>78</sup> See Kurtz, *supra* note 44, at 1351.

<sup>79</sup> See Augustyn et al., *supra* note 7, at 49; see also Tomkins et al., *supra* note 24, at 148.

<sup>80</sup> See Crosby, *supra* note 2, at 502.

<sup>81</sup> See *id.* at 501.

<sup>82</sup> See Augustyn et al., *supra* note 7, at 41.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*; Crosby, *supra* note 2, at 501.

<sup>85</sup> See Tomkins et al., *supra* note 24, at 146. Some studies, however, show that kids who witness violence have higher social competence. The explanation may be that some children develop coping strategies that actually lessen the effects of violence. Edleson, *supra* note 31, at 864. Coping strategies are discussed in Part I.C.5, *infra*.

manner.<sup>86</sup> Their skill in understanding how others feel and visualizing the perspectives of others is diminished.<sup>87</sup> They learn that violence is a “normal” part of intimate relationships, that violence is an appropriate method of resolving conflicts, and sadly, that violence often goes unpunished.<sup>88</sup> These children, especially boys, often use violence and believe that the use of violence to resolve conflicts is justified.<sup>89</sup>

### 3. Cognitive Functioning

Witnessing violence can have serious consequences for a child’s cognitive function and ability to learn. For toddlers, witnessing violence can cause developmental regression and language lag.<sup>90</sup> Younger children also display delays in verbal development, as well as increased cognitive confusion.<sup>91</sup> Children who witness face a range of school problems, including poor performance, erratic attendance, distractibility and school phobias.<sup>92</sup>

### 4. Long Term Effects

Long term effects of witnessing domestic violence as a child include trauma-related symptoms, depression, aggression, and low self-esteem.<sup>93</sup> Perhaps the most often discussed and most distressing effect is the propensity to carry violence into future relationships. The main risk factors for engaging in or being a victim of adult violence are exposure to parental violence and fighting within the home of origin.<sup>94</sup> The reason for the increased risk, as discussed above, is not surprising. “Boys and girls who witness violence are more likely to learn that violence is an appropriate way of resolving conflicts in human relationships. As adults, they are more likely to act in a manner consistent with these childhood lessons.”<sup>95</sup>

Boys who are exposed to or experience violence are at “major risk” of becoming batterers.<sup>96</sup> In fact, the strongest risk factor for transmitting violence from

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<sup>86</sup> Edleson, *supra* note 31, at 860; Tomkins et al., *supra* note 24, at 146.

<sup>87</sup> Edleson, *supra* note 31, at 860.

<sup>88</sup> Crosby, *supra* note 2, at 504-05.

<sup>89</sup> Edleson, *supra* note 31, at 860.

<sup>90</sup> Augustyn et al., *supra* note 7, at 49.

<sup>91</sup> See Cahn, *supra* note 22, at 1057; Kurtz, *supra* note 44, at 1351.

<sup>92</sup> See Tomkins et al., *supra* note 24, at 145.

<sup>93</sup> See *id.* at 149-50.

<sup>94</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 18-19.

<sup>95</sup> Tomkins et al., *supra* note 24, at 151.

<sup>96</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 22, 37.

one generation to the next is a child's exposure to his father abusing his mother.<sup>97</sup> As the level of violence in the family increases, so does the likelihood that a child will grow up to engage in abusive or violent behavior.<sup>98</sup> The majority of batterers witnessed violence as children, and sons of violent fathers are three times more likely to batter their partners.<sup>99</sup> Girls, in turn, learn that victimization is inevitable, that no one can alter the pattern of violence.<sup>100</sup> As a result, girls who have been exposed to or experienced violence are at greater risk for violence in their own dating relationships.<sup>101</sup>

The long-term effects of exposure to domestic violence have consequences for society as a whole. Domestic violence is a major cause of homelessness for women and children; as many as half of the homeless women and children in America are fleeing domestic violence.<sup>102</sup> Witnessing domestic violence has criminal implications as well. Sixty-three percent of males between the ages of eleven and twenty who are serving time for homicide killed their mothers' batterers.<sup>103</sup> Nationally, eighty-five percent of federal offenders being held for violent crimes came from homes where they witnessed or suffered domestic abuse.<sup>104</sup> In Massachusetts, children from violent homes were twenty-four times more likely to commit a rape, and seventy-four times more likely to commit crimes against persons.<sup>105</sup> At one time, the majority of these violent offenders were children cowering as violence invaded their homes.

## 5. Coping Strategies

Children of violent homes "must find a way to preserve a sense of trust in people who are untrustworthy, safety in a situation that is unsafe, control in a situation that is terrifyingly unpredictable, power in a situation of helplessness."<sup>106</sup> Various strategies help children to cope with the violence in their homes.

During a violent event, children cope by crying, shouting at or pleading for their mothers, remaining silent, leaving the room, intervening in the event, seeking attention through their own behavior or restlessness, or choosing a parent as a

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<sup>97</sup> See *id.* at 53.

<sup>98</sup> See *id.* at 21.

<sup>99</sup> See Tomkins et al., *supra* note 24, at 150.

<sup>100</sup> See *id.* at 151.

<sup>101</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 32.

<sup>102</sup> See Salzman, *supra* note 42, at 333; Zorza, *Protecting the Children*, *supra* note 9, at 1116 (both citing study by National Coalition Against Domestic Violence).

<sup>103</sup> See Salzman, *supra* note 42, at 334 n.29.

<sup>104</sup> See *id.* at 331.

<sup>105</sup> See *id.* at 334 nn.27-28.

<sup>106</sup> JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 96 (1992).

target.<sup>107</sup> They learn to protect themselves by placating the batterer—a strategy that they may have seen their mothers use.<sup>108</sup> Children use both “emotion focused” and “problem focused” coping strategies. “Emotion focused” strategies help the child to control her own emotional response to the situation: wishing the problem away, minimizing the problem, forgiving the perpetrator, or refusing to discuss the problem. “Problem focused” strategies attempt to change the events, for example, by intervening in the violent event.<sup>109</sup> After a violent event, children may seek security or comfort from the battered parent, or, conversely, play a parental role with the battered parent, increasing the child’s sense of control.<sup>110</sup>

Mental health intervention helps children cope with the trauma of witnessing family violence. Strategies for successful intervention will be discussed in Part IV.B, *infra*.

### III. CHILDREN AS PROPERTY: CUSTODY AND VISITATION ISSUES

“Throughout history, children have been treated by the legal system as the property and responsibility of their parents—putting a child in a particularly vulnerable position if family members are abusive.”<sup>111</sup>

The conception of children as the property of their parents (usually, their fathers) dates back to English common law.<sup>112</sup> While much has been done to secure legal rights for children, the law surrounding custody and visitation lags behind. Custody provisions underscore the notion of children as property both literally, allowing (and often suggesting) that children be shuttled between their parents, and figuratively, as parents parcel out responsibility for decision-making without considering the child’s input. Decisions made pursuant to custody and visitation laws, while ostensibly furthering the “best interest of the child,” more frequently tend to reflect the interests and desires of the parents, reinforcing the sense that children are essentially chattel.

The likelihood that custody or visitation litigation will reflect the parents’ agendas is greater in court proceedings involving families plagued by domestic violence.<sup>113</sup> Sensitivity to issues of violence is especially important given that

<sup>107</sup> For a general discussion of coping mechanisms, see Edleson, *supra* note 31, at 864.

<sup>108</sup> See Crosby, *supra* note 2, at 500-01.

<sup>109</sup> See Edleson, *supra* note 31, at 864 (citing studies by Peled and Folkman and Lazarus). Boys who witness are more likely to use “aggressive control” to cope with violent events. They are less able to handle simulated family interactions, more likely to report that they would intervene in violent events, more aroused by simulated conflict, and less likely to criticize those in simulated conflicts. See Edleson, *supra* note 31, at 864.

<sup>110</sup> See Kerouac et al., *supra* note 51, at 413-26.

<sup>111</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 47.

<sup>112</sup> See Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 261 (1995).

<sup>113</sup> Separation does not prevent domestic abuse; abuse, harassment and stalking continue after separation, especially at times of visitation. Separation brings an increased risk of homicide, which can occur



children are often used as symbolic possessions in these families. Threats to abduct or harm children are commonplace, and killings of children in retaliation are possible.<sup>114</sup> Batterers also use children as pawns in more subtle ways—bringing them back from visitations late or taking them out of school—in order to exert control over the abused parent.<sup>115</sup> Custody disputes initiated by batterers are often another form of abuse.<sup>116</sup> Fathers who batter are likely to use legal action to threaten or harass their former partners, are twice as likely to seek sole physical custody of their children as non-violent fathers, and are more likely to dispute custody if a son is involved.<sup>117</sup> Some women see no choice but to return to their batterers in order to prevent harm to their children,<sup>118</sup> as “separation may actually provide fathers with more opportunities to hurt their children.”<sup>119</sup> The “best interest of the child” is forgotten as the child becomes yet another means of exerting power and control, another piece of property to battle over.

Although some custody and visitation statutes have been altered to reflect the understanding that family violence should be a crucial element in determining child custody and visitation, others fail to give proper weight to family violence in making these decisions. Moreover, even when statutes are changed to reflect this understanding, judges fail to adhere to the statutory mandates. Worse still, many judges simply refuse to connect violence against a parent with damage to a child; if the child hasn’t been physically harmed by the batterer, judges fail to see why family violence should impact upon custody and visitation decisions. As a result, even in jurisdictions with strong custody and visitation laws, the needs of child witnesses are not adequately protected—especially in the context of visitation. The impact of this failure in the system cannot be underestimated. Perhaps no decision has as great a bearing on the well-being of a child as the decision about who will primarily parent the child. The custodial parent has a profound influence on the development of the child’s identity, social skills and cognitive and academic achievement. The failure to ensure that children are placed in safe and nurturing custodial settings will have lifetime ramifications.

This section will consider first the legal mandates that guide custody and visitation decisions in family violence cases, as well as judicial reluctance to implement such mandates and the need for judicial education. The section will then address the special problems posed by visitation decisions and suggest one way of

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during visitation exchanges or custody hearings. See Saunders, *supra* note 10, at 3.

<sup>114</sup> See *id.* at 3; AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 41.

<sup>115</sup> See Mary Lynne Vellinga, *Custody Laws Under Fire: Parents Who Batter Often Allowed to Retain Joint Care*, SACRAMENTO BEE, March 23, 1997 ¶ 46 (visited Dec. 17, 1998) [http://www.sacbee.com/news/projects/violence/part\\_03c.html](http://www.sacbee.com/news/projects/violence/part_03c.html).

<sup>116</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 39. Similarly, “[w]hen a couple divorces, the legal system may become a symbolic battleground on which the male batterer continues his abuse.” *Id.* at 40.

<sup>117</sup> See *id.* at 40. Fathers who batter are also three times as likely to have child support arrearages. *Id.*

<sup>118</sup> See *id.* at 41.

<sup>119</sup> Zorza, *Protecting the Children*, *supra* note 9, at 1113.

balancing the continuation of the relationship between the non-custodial parent and child with the need to make visitation safer for child witnesses and their battered parents: visitation centers.

A. *Statutes and Case Law*

1. Custody

In custody cases, parents generally start (in the eyes of the court) from equal positions: both are assumed to be “fit” except in “extraordinary circumstances.”<sup>120</sup> Custody decisions turn on the “best interest of the child,” a legal concept whose elements vary by jurisdiction but which is meant to convey a sense that the child’s needs are the central focus of custody determinations. In practice, however, the factors used to determine best interest focus on the behavior of the parents, in order to give the apparently more qualified and capable parent custody.<sup>121</sup>

Where does evidence of violence fit into this calculation? Prior to 1970 and the ascendancy of the best interest standard, decisions about custody were based on the morality of parental conduct. Cruelty, defined as serious and continual abuse, was a basis for awarding custody to the victim of the cruelty. As the focus shifted from parental conduct to the best interest of the child, however, the importance of the relationship between the parents diminished.<sup>122</sup> Instead, because the best interest standard largely focused on the relationship between parent and child, evidence of domestic violence was not deemed particularly relevant to custody decisions.<sup>123</sup>

The growing popularity of joint custody as an option for courts complicates the consideration of violence in custody determinations. Proponents argue that in joint custodial arrangements, where parents share some combination of physical custody of and legal authority over their children, children are better adjusted, fathers are more involved, child support is paid more regularly, and parents work together cooperatively. In fact, however, none of these justifications is actually borne out by research on parents who chose to share custody (the parents most likely to see good outcomes from joint custodial arrangements).<sup>124</sup> In families that have joint custody imposed upon them, the results are even worse. Rather than advancing the best interest of children, imposed joint custody can actually be harmful for them. Children in imposed joint custody arrangements are more depressed and disturbed than children in the sole custody of one parent.<sup>125</sup>

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<sup>120</sup> Cahn, *supra* note 22, at 1042 n.1, 1058 n. 100; *see also* Peterson, *supra* note 18, at 526.

<sup>121</sup> *See* Kurtz, *supra* note 44, at 1349.

<sup>122</sup> *See* Cahn, *supra* note 22, at 1043.

<sup>123</sup> *See* Kurtz, *supra* note 44, at 1361.

<sup>124</sup> *See* Zorza, *Protecting the Children*, *supra* note 9, at 1123-24.

<sup>125</sup> *See id.* at 1124.

Moreover, joint custody requires ongoing open communication between the parents. "Highly conflictual" (if not violent) parents are not likely to co-parent well.<sup>126</sup>

Joint custody can be dangerous in families with a history of abuse. It assumes an equality of power that is lacking in families where violence is or has been prevalent. Meaningful separation is almost impossible for a jointly parenting victim of abuse given the requirement that parents participate equally in decision-making.<sup>127</sup> Joint custody essentially requires a battered parent to jeopardize her safety by mandating frequent and potentially conflict-laden interaction with the abusive parent.

The rise of joint custody and the recognition of the problems it poses for battered parents spurred jurisdictions to consider domestic violence when making custody decisions. As judges have increasingly looked to joint custodial arrangements as a means of resolving custody cases, states have begun to acknowledge domestic violence in their custody statutes. The move toward factoring domestic violence into custody decisions gained a great deal of momentum with a 1990 Congressional Resolution addressing the issue. House of Representatives Congressional Resolution 172, passed by the 101<sup>st</sup> Congress, urges states to include in their custody statutes a presumption against awarding custody to an abusive parent. The resolution makes specific findings about the damage to children that results from witnessing violence and draws the logical conclusion that awarding custody to an abusive spouse is detrimental to a child's well-being.<sup>128</sup> Subsequently, the National Council of Juvenile and Family Court Judges developed a Model Code on Domestic and Family Violence that incorporated such a presumption:

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic . . . violence has occurred raises a rebuttable presumption that it is . . . not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.<sup>129</sup>

The Model Code further states that it is in the best interest of children to reside with the non-violent parent and emphasizes that the safety and well-being of

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<sup>126</sup> Saunders, *supra* note 10, at 2.

<sup>127</sup> See Cahn, *supra* note 22, at 1064; see also AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 101 ("Joint custody . . . is sometimes used as a strategy to force parents to work out their differences, supposedly for the sake of the children. Studies show that this strategy rarely succeeds and is sometimes harmful.").

<sup>128</sup> See H.R. Res. 172, 101<sup>st</sup> Cong. (1990). For a discussion of the federal response to domestic violence and child custody, see Janice A. Drye, *The Silent Victims of Domestic Violence: Children Forgotten By The Judicial System*, 34 GONZ. L. REV. 229, 236-39 (1999).

<sup>129</sup> National Council of Juvenile and Family Court Judges, Model Code on Domestic and Family Violence § 401 (1994).

the child and the battered parent should be paramount in custody decisions.<sup>130</sup> By the end of 1997, thirteen states had adopted the Model Code's custody provision.<sup>131</sup>

The vast majority of the states and the District of Columbia currently have statutes or case law requiring that courts take evidence of domestic violence into consideration when making custody decisions.<sup>132</sup> Domestic violence is generally factored into custody decisions in one of three ways. In some states, evidence of domestic violence must be considered before joint custody is awarded. In others, evidence about domestic violence must be part of the court's analysis of the child's best interest. The third group of statutes presumes that awarding custody to perpetrators of family violence is not in the child's best interest.<sup>133</sup>

The first group of statutes simply requires that domestic violence be considered before judges make decisions about custody. Under this type of statute, judges have a great deal of discretion in determining the weight to be given to evidence of family violence.<sup>134</sup> Family violence is not considered a "special" factor.<sup>135</sup> Some courts are required to consider domestic violence between the parents only where that conduct "affects" the child,<sup>136</sup> which is often defined quite narrowly.<sup>137</sup>

The second type of statute requires that courts consider whether and how domestic violence impacts upon the best interest of the child.<sup>138</sup> Courts have factored domestic violence into the best interest test both in cases between the abusive parent and the abused partner and in cases between the abusive parent and

<sup>130</sup> See Saunders, *supra* note 10, at 4-5. It is interesting to note the dissonance between the Model Code of the National Council of Juvenile and Family Court Judges and the Uniform Marriage and Divorce Act, which precludes the court from considering conduct of the proposed custodian that does not affect the relationship to the child. UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1973).

<sup>131</sup> See *id.* at 1.

<sup>132</sup> See Kurtz, *supra* note 44, at 1349.

<sup>133</sup> See Cahn, *supra* note 22, at 1063-65; Leslie D. Johnson, *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence*, 22 L. & PSYCHOL. REV. 271, 276 (1998).

<sup>134</sup> See, e.g., S.C. CODE ANN. § 20-7-1530 (Law. Co-op 1998) ("In making a decision regarding custody of a minor child . . . the court must give weight to evidence of domestic violence . . .").

<sup>135</sup> Saunders, *supra* note 10, at 1.

<sup>136</sup> Cahn, *supra* note 22, at 1069-70.

<sup>137</sup> See Part II.A.3., *infra*.

<sup>138</sup> See, e.g., ARK. CODE ANN. § 9-13-101 (Michie 1987) (court must consider effect of domestic violence on the best interests of the child "whether or not the child was physically injured or personally witnessed the abuse . . ."); CAL. FAM. CODE § 3031 (West 1999) (where a restraining order is in effect or has previously been issued, court shall consider whether best interest of the child requires that custody be limited, suspended or denied); N.C. GEN. STAT. § 50-13.2 (1998) (in making determination about custody order that will "best promote the interest and welfare of the child," the court shall consider "domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party"); N.Y. DOM. REL. LAW § 240 (McKinney 1999) ("court must consider effect of domestic violence upon best interest of child").

a third party, where the abusive parent has killed the child's other parent.<sup>139</sup> Under this statutory regime, although the court is required to consider how domestic violence affects the child and usually must provide some rationale for giving even partial custody to an abusive parent, the court still has the discretion to award joint and even sole custody to an abusive parent if the court determines that the custodial arrangement is in the child's best interest.<sup>140</sup> In a variation on theme, some statutes assume that the presence of domestic violence is contrary to the child's best interest.<sup>141</sup> Domestic violence can also be folded into other statutory "best interest" factors, including the interaction of the child with the parents, or the mental and physical health of all involved parties.<sup>142</sup>

Case law in some states creates the same kind of test. In Massachusetts, an appellate court first embraced the proposition that domestic violence was relevant to child custody decisions. In *R.H. v. B.F.*, the court held that in cases where there was

credible evidence of physical abuse to a household member by a person seeking custody of or visitation with a child, a trial judge must make detailed and precise findings of fact which demonstrate that the effects of the domestic violence on the child have been evaluated and, in the event physical or legal custody is awarded to the perpetrator of the abuse, how such an award advances the best

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<sup>139</sup> See Cahn, *supra* note 22, at 1063. Some laws are written anticipating that judges will award joint custody despite the presence of domestic violence. See R.I. GEN. LAWS § 15-5-16 (1998) ("[W]here domestic violence is proven, any award of joint custody . . . shall be arranged so as to best protect the child and the abused parent from further harm.").

<sup>140</sup> See Cahn, *supra* note 22, at 1066.

<sup>141</sup> See, e.g., FLA. STAT. ANN. § 61.13 (West 1998) (creating rebuttable presumption that certain degrees of domestic violence are detrimental to the child and requiring court to consider evidence of domestic violence where presumption is not triggered); R.I. GEN. LAWS § 15-5-16 (1998) ("the court . . . shall consider evidence of past or present domestic violence, if proven, as a factor not in the best interest of the child"); WYO. STAT. ANN. § 20-2-113(a) (Michie 1996) (domestic violence is "contrary to the best interest of the child").

<sup>142</sup> See Cahn, *supra* note 22, at 1074-75; see also MO. ANN. STAT. § 425.375 (West 1998) (including consideration of domestic violence in "mental and physical health of all individuals involved" and requiring written findings of fact where the court determines that awarding custody to the abusive parent is in the child's best interest).

Competing provisions can weaken the domestic violence protections in custody statutes. Perhaps no statutory factor poses as great a risk to the consideration of domestic violence as the "friendly parent" provision. In states with "friendly parent" provisions, courts must consider which parent is more likely to facilitate the child's relationship with the other parent. Several states that allow consideration of domestic violence in custody determinations also have friendly parent provisions. The problem for victims of violence and their children is that if they cannot prove sufficiently that domestic violence occurred, they are likely to appear "unfriendly" to the court. A battered woman's legitimate concern about the batterer's ability to parent can be used as a justification for denying her custody under these provisions. Ultimately, the battered woman may feel pressured to accept joint custody rather than risk being labeled "unfriendly" and potentially losing the child to the batterer, who declares himself eager to "co-parent." See Cahn, *supra* note 22, at 1064, 1068; Saunders, *supra* note 10, at 2; Zorza, *Protecting the Children*, *supra* note 9, at 1122.

interests of the child.<sup>143</sup>

The Supreme Judicial Court later adopted this interpretation. In *Custody of Vaughn*, the court held that trial courts must make “detailed and comprehensive findings of fact on issues of domestic violence and its effect upon the child as well as upon the father’s parenting ability.”<sup>144</sup> The court explained:

The very frequency of domestic violence in disputes about child custody may have the effect of inuring courts to it and thus minimizing its significance. Requiring the courts to make explicit findings about the effect of the violence on the child and the appropriateness of the custody award in light of that effect will serve to keep these matters well in the foreground of judges’ thinking.<sup>145</sup>

The court discussed the impact of domestic violence on children, stating that “a child who has been either the victim or the spectator of [domestic] abuse suffers a distinctly grievous kind of harm.”<sup>146</sup> Similarly, in West Virginia, case law establishes the principle that “domestic violence evidence should be considered when determining parental fitness and child custody.”<sup>147</sup>

The third type of statute creates a presumption that a batterer should not have custody of a child. These statutes reflect the belief that giving a judge discretion to consider evidence of violence does not provide sufficient protection to children in custody cases involving issues of family violence.<sup>148</sup> In some states, the presumption against awarding custody to the perpetrator of domestic violence can be rebutted by evidence that the perpetrator has completed a batterer’s treatment program or that there are extraordinary circumstances which show that there is no risk of continuing violence.<sup>149</sup> Other statutes flatly forbid awarding custody to a

<sup>143</sup> R.H. v. B.F., 653 N.E.2d 195 (Mass. App. Ct. 1995).

<sup>144</sup> *Custody of Vaughn*, 664 N.E.2d 434, 438 (Mass. 1996) (quoting R.H. v. B.F., 653 N.E.2d 195 (Mass. App. Ct. 1995)).

<sup>145</sup> *Id.* at 439-40.

<sup>146</sup> *Id.* at 437. Subsequently, Massachusetts amended its custody statute to create a rebuttable presumption against awarding custody to a battering parent. MASS. GEN. LAWS ch. 208, § 31A (1998).

<sup>147</sup> *Mary Ann P. v. William R.P., Jr.*, 475 S.E.2d 1, 7 (W. Va. 1996).

<sup>148</sup> *See Cahn, supra* note 22, at 1345.

<sup>149</sup> *See, e.g.,* LA. REV. STAT. ANN. § 9:364 (West 1997). The Louisiana statute includes a presumption against awarding either sole or joint custody to a perpetrator of domestic violence. To rebut the presumption, the perpetrator must show by a preponderance of the evidence that he has completed a treatment program, is not abusing alcohol or drugs and that it is in the best interest of the child for him to participate in the child’s life as a custodial parent. Similarly, Delaware’s statute allows for the presumption against sole or joint custody to be overcome if the perpetrator has completed a family violence or comparable program, has completed a program for drug/alcohol abuse, if such a program was deemed necessary by the court, and has demonstrated that giving custodial responsibilities to the abusive parent is in the child’s best interest. If the perpetrator has not met these criteria, the presumption can only be overcome if the court finds “extraordinary

perpetrator of domestic violence.<sup>150</sup>

## 2. Visitation

States factor domestic violence into visitation decisions in a number of ways. Few of them offer protection commensurate to that provided in custody cases, and fewer still assume that visitation might need to be terminated in order to protect the child (although courts certainly retain the discretion to deny visitation where the child's best interest dictates such an action).

In a number of states, grants of visitation are predicated upon arranging the visitation "so as to best protect the child and the abused parent from future harm."<sup>151</sup> In other states, the language regarding visitation echoes that pertaining to custody. Visitation is awarded where it is in the best interest of the child; domestic violence is relevant to the best interest determination.<sup>152</sup> Still other statutes impose more stringent standards for visitation. Some place the burden of showing that visitation will not endanger the child or significantly impair the child's emotional development on the perpetrator of family violence, in addition to requiring a visitation arrangement that protects the custodial parent and the child from physical harm.<sup>153</sup> A few states presume that batterers should not visit with children in an unsupervised setting unless certain conditions are met.<sup>154</sup>

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circumstances" warranting the rejection of the presumption. DEL. CODE ANN. Tit. 13, § 705A (1998). See also NEV. REV. STAT. § 125.480 (1997); N.D. CENT. CODE § 14-09-06.2 (1997); Kurtz, *supra* note 44, at 1349.

Ironically, at least one state is already retreating from the strong position against granting custody to batterers that it took only a few years ago. North Dakota's statute originally triggered a presumption against granting custody where there was "credible evidence that domestic violence has occurred." 1993 N.D. Sess. Laws ch. 144, § 2. But in 1997, the legislature raised the degree of violence necessary to trigger the presumption. The presumption now comes into play when the court finds "credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding." N.D. CENT. CODE § 14-09-06.2 (1997). In at least two reported cases, the change in the level of violence required arguably changed the outcome of the case. See *Holtz v. Holtz*, 595 N.W.2d (N.D. 1999); *Reeves v. Chepulis*, 591 N.W.2d 791 (N.D. 1999).

<sup>150</sup> In Texas, for example, the court cannot award joint custody where "credible evidence" of a "history or pattern of past or present . . . abuse" against either a parent, spouse, or child exists. TEX. FAM. CODE ANN. § 153.004 (West 1997); see also ARIZ. REV. STAT. ANN. § 25-403 (West 1998) (forbidding award of joint custody where domestic violence has occurred).

<sup>151</sup> R.I. GEN. LAWS § 15-5-16 (1998). See also FLA. STAT. ANN. § 61.13 (West 1998); MO. ANN. STAT. § 452.375 (West 1998); NEV. REV. STAT. § 125.480 (1997) (requiring "adequate protection"); N.D. CENT. CODE § 12-09-06.2 (1997).

<sup>152</sup> See ARK. CODE ANN. § 9-13-101 (Michie 1997); N.C. GEN. STAT. § 50-13.2 (1998); N.Y. DOM. REL. LAW § 240 (McKinney 1999).

<sup>153</sup> See ARIZ. REV. STAT. ANN. § 25-403 (West 1998); D.C. CODE ANN. § 16-914 (West 1997).

<sup>154</sup> See LA. REV. STAT. ANN. § 9:364 (West 1998) (presumption against unsupervised visitation for batterers; unsupervised visitation available if batterer completes treatment program, does not abuse alcohol and/or drugs, and the court finds that visitation will not endanger the child and is in the child's best interests); N.D. CENT. CODE § 14-05-22 (1997) ("court shall allow only supervised visitation . . . unless there is a showing by clear and convincing evidence that unsupervised visitation would not endanger the child's physical or emotional health."). California's statute does not create a presumption against unsupervised

### 3. Judicial (In)Discretion

"The idea that battering is unrelated to parenting is almost beyond belief . . ."

<sup>155</sup>

For years, advocates for battered women and children have argued that states should explicitly recognize domestic violence in making custody and visitation determinations. They have largely won that fight: the majority of the states require courts to consider domestic violence in making these determinations. But it seems that advocates have won only the battle and not the war; courts (and those who work for them) continue to routinely discount the impact that witnessing violence has on children, fail to (or, worse yet, refuse to) see how partner abuse links to custody and visitation, or simply disregard the laws altogether.<sup>156</sup>

#### a. What Should Judges Look For?

In making custody determinations against a backdrop of family violence, judges should consider a range of factors. These factors look to the characteristics of a battering relationship, the impact of violence on children, and the continuing need for the batterer to exercise control over his family.

"[F]amily law courts have as their basic premise that both parents are good for a child and both parents should be involved in a child's upbringing. This is all extremely unproductive when you're talking about domestic violence."<sup>157</sup> Custody and visitation laws assume that the parties are in equal positions of power and that both parents will act in the child's best interest.<sup>158</sup> This assumption is particularly out of place in cases involving family violence, where power imbalances favoring the perpetrator are the norm and children are often used as pawns in the control games played by the batterer.

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visitation, but does require the court to consider whether the best interest of the child requires that visitation be supervised, suspended or denied altogether. CAL. FAM. CODE § 3031 (West 1999). In a similar vein, Washington State's statute states that visitation "shall" be limited where there is a history of acts of domestic violence. WASH. REV. CODE ANN. § 26.10.160 (West 1998).

<sup>155</sup>

Cahn, *supra* note 22, at 1073.

<sup>156</sup>

It is important to remember the context in which these cases arise. Abusive men are more likely to fight for custody of their children and to receive favorable treatment in court. *See McMahon & Pence, supra* note 73, at 195. Fathers who fight win either sole or joint custody a majority (70%) of the time, with abusive fathers at least as likely to receive custody as non-abusive fathers. Zorza, *Protecting the Children, supra* note 9, at 1113. *See also Vellinga, supra* note 115, at ¶ 10 (citing study by Geraldine Stahly, associate professor of psychology at California State University, San Bernadino, which showed that batterers were twice as likely to seek custody and obtained custody about half of the time (the same rate as non-batterers). Similarly, a study of over 100,000 women in California who had used domestic violence services found that courts were more likely to award full custody to a father who the court knew was physically or sexually abusing the children than to fathers who had not abused their children. Marsha B. Liss & Geraldine Butes Stahly, *Domestic Violence and Child Custody*, in *BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* 175, 183 (1993).

<sup>157</sup>

Vellinga, *supra* note 115, at ¶ 23 (quoting California Assemblywoman Sheila Kuehl of Santa Monica).

<sup>158</sup>

*See Kurtz, supra* note 44, at 1368.



Once the court is aware that family violence is an issue in a custody case, the court "should be on notice and should make an inquiry as to the potential danger to the child and to the appropriateness of an abuser as caretaker for the child."<sup>159</sup> The court's assessment should not turn on whether the child has been physically harmed in the past.<sup>160</sup> The perpetrator's history of causing fear as well as physical harm should inform the court's decision.<sup>161</sup> The court should consider that abusers frequently have difficulty providing care and nurturing to children and are often distant and uneasy parents.<sup>162</sup> Judges should probe whether the abuser has received specialized violence counseling, the prognosis of the counselor, the history of the parent/child relationship and the batterer's reason for seeking custody.<sup>163</sup> In assessing the victim of violence, judges should ask what the likelihood is of her involvement in further violent relationships, whether and to what extent her emotional stability is compromised by the abuse, what her historical relationship with the children has been, and what her motives are for seeking custody.<sup>164</sup> Judges should not, however,

assign the victim equal responsibility for the psychological damage done to the child in the violent home. In doing so, they ignore the reasons that she stays in the relationship, they diminish his responsibility for his choice to use violence against his partner, and they fail to take into consideration the energy she typically expends in trying to reduce tension and stop the violence in the home.<sup>165</sup>

Judges must remember that the parties' appearances can be deceiving; the perpetrator may appear in command of himself, calm and well-spoken while the victim appears unstable, nervous, inarticulate and/or angry.<sup>166</sup>

In assessing the parties, judges, like therapists, should be careful to avoid common pitfalls, such as failing to see that the victim's anger is an appropriate response to long-term or severe abuse; justifying the abuse by looking at the victim's behavior or personality; identifying with a seemingly pleasant man pushed beyond his limits by a hysterical woman; dismissing charges of abuse when the

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<sup>159</sup> Rabin, *supra* note 52, at 1115.

<sup>160</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 101.

<sup>161</sup> See Saunders, *supra* note 10, at 5.

<sup>162</sup> See Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide To Custody Decisions When Spouse Abuse Is Charged*, 27 JUDGES' J. 8, 9 (1988).

<sup>163</sup> See *id.* at 13. Some commentators believe that states should mandate that batterers complete counseling programs prior to receiving custody or unsupervised visitation. See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 99; Johnson, *supra* note 133, at 278-79.

<sup>164</sup> See Crites & Coker, *supra* note 162, at 13.

<sup>165</sup> *Id.* at 11.

<sup>166</sup> See *id.* at 40.

perpetrator is not a typical brutish abuser; allowing the perpetrator to minimize the abuse; labeling fear of future violence “paranoid;” describing the victim as a masochist; criticizing the victim for her anger at her partner’s action for custody; and failing to see the custody fight as a further manifestation of abuse and control.<sup>167</sup> Judges should be wary of the batterer’s manipulation. For example, abusers may be seeking visitation to gain access to their former partners, using the children to spy on their mother or to urge their mother to allow their father to return to the home.<sup>168</sup>

Most importantly, judges who hear custody and visitation cases need training in domestic violence. They need to understand and internalize the concepts of power and control, the impact of domestic violence on children, the relationships between partner abuse and child abuse, and the efficacy of treatment programs for batterers.<sup>169</sup> This training should be comprehensive, and more importantly, ongoing.<sup>170</sup> Like everyone else, judges who confront family violence day in and day out grow inured to it; they need to be constantly reminded of the horrors visited on its victims.

#### b. What Do Judges Do?

“[I]ntervention, once the court becomes involved, is as unpredictable as the judge who hears the case.”<sup>171</sup>

Even in this era of enhanced awareness of and education about domestic violence and the laws designed to protect its victims, a surprising number of judges still “don’t get it.” Many judges lack training in or trivialize domestic violence; others believe that violence doesn’t affect the children unless the children are the immediate victims.<sup>172</sup> When the court fails to consider the family in the context of the violence, the non-violent parent is at a distinct disadvantage. Actions that may seem reasonable as attempts to protect herself or her children from abuse are read as instability and mothers may appear to be unfit as a result of the impact of the violence.<sup>173</sup> Survivors of domestic violence who raise concerns about the potential for abuse as the court is attempting to “smooth things over” are labeled petty, angry or vindictive.<sup>174</sup>

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<sup>167</sup> See *id.* at 40-41; see also David Adams, *Identifying the Assaultive Husband in Court: You Be The Judge*, BOSTON B.J., July/Aug. 1989, at 23-25.

<sup>168</sup> See Adams, *supra* note 167 at 23-25.

<sup>169</sup> See Cahn, *supra* note 22, at 1093; Johnson, *supra* note 133, at 283-84.

<sup>170</sup> See Salzman, *supra* note 42, at 356.

<sup>171</sup> Rabin, *supra* note 52, at 1116.

<sup>172</sup> See Kurtz, *supra* note 44, at 1359; Zorza, *Protecting the Children*, *supra* note 9, at 1119; see also Peterson, *supra* note 18, at 522-23.

<sup>173</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 100; McMahon & Pence, *supra* note 73, at 200-01.

<sup>174</sup> See Zorza, *Protecting the Children*, *supra* note 9, at 1120.

When judges do not understand or consider domestic violence in making custody determinations, children ultimately lose. "Based on misconceptions regarding what types of women are battered or the existence of battering and its effects on children, courts make judgments that may not be in the child's best interest."<sup>175</sup> Some battered women conclude that giving up their children is the only solution when courts disregard concerns about their safety and that of their children.<sup>176</sup> And despite the existence of stronger laws and increased training, judges continue to ignore the impact of family violence on children and on custody decisions.

In my experience, judges, even judges considered sensitive and well-intentioned, routinely discount the impact of violence on children. This point was driven home for me in a case involving the eight year-old and ten year-old sons of a survivor of domestic violence. The children had witnessed violence against their mother and had also been physically and sexually abused by their father. They had undergone treatment with a wonderful counselor and had made a great deal of progress when their father petitioned the court for visitation. During the visitation hearing, their mental health counselor testified that the children had, in his opinion, been severely abused and that their emotional health would absolutely be damaged if forced to visit with their father.<sup>177</sup> The judge listened to this testimony and then responded: "Well, couldn't we re-refer them to you for counseling if we ordered visitation?" The counselor, stunned, simply said, "I suppose so."<sup>178</sup>

This same judge participated in a training for judges in the District of Columbia Superior Court Domestic Violence Unit, a specialized court that hears only criminal and civil domestic violence cases and related civil matters, including custody and visitation disputes. After sitting in the Unit for a year, he had made a large number of custody and visitation decisions. One of the presenters reminded the judges that the visitation statutes put the burden of proving that visitation would not endanger the child physically or emotionally on the batterer. The judge responded that while this was, in fact, what the statute said, the majority of batterers went unrepresented in these matters and could not possibly be expected to meet their burden of proof (he did not mention that the vast majority of victims were also unrepresented). His clear implication was that because batterers could not be expected to meet the burden of proof, visitation decisions were being made without considering the statutory mandates or the emotional detriment to the child.

These two anecdotes illustrate the difficulty of protecting children within the domestic violence and child custody systems. Even where, as in the District of Columbia, strong laws protect children from further exposure to family violence,

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<sup>175</sup> Cahn, *supra* note 22, at 1035.

<sup>176</sup> See Zorza, *Protecting the Children*, *supra* note 9, at 1124.

<sup>177</sup> In the District of Columbia, a perpetrator of family violence must show that visitation would not physically endanger the custodial parent or children or be emotionally detrimental to the children. D.C. CODE ANN. § 16-914 (a-1) (West 1998).

<sup>178</sup> Ultimately, after speaking with the children in chambers, the court denied the father's request for visitation.

the failure of judges to enforce those laws undermines even the staunchest protections.

Such stories are not specific to the District of Columbia.<sup>179</sup> In Sacramento, California, even after an abused wife had filed papers with the court alleging daily kicking, punching, and choking before she fled, and even after a court mediator found that the batterer had “anger control problems,” a court awarded the father joint custody and unsupervised visitation. Several weeks after the court’s decision, the father did not return the child after a scheduled unsupervised visit. Four days later, both the father and the son were found dead—a murder/suicide. The mother noted, “During the last custody trial we had I did state to one of the judges that I was afraid for my life and my son’s life. I think honestly the judges think women are exaggerating about how much they’re abused.”<sup>180</sup>

Opinions from courts throughout the country demonstrate the judicial system’s unwillingness to consider domestic violence when making custody determinations. Appellate courts have repeatedly been forced to overturn the rulings of trial courts that failed to consider or give sufficient weight to evidence of domestic violence. *Hicks v. Hicks*<sup>181</sup> is one such case. In *Hicks*, the court heard the following uncontroverted testimony: the father hit the mother in the stomach while she was pregnant, causing miscarriages on more than one occasion; the father broke brooms over the mother on more than one occasion; the father picked the mother up with a two-by-four under her neck and threw her off the porch; the father forced sexual intercourse on the mother on more than one occasion.<sup>182</sup> The court heard additional disputed testimony about blows from the husband causing black eyes and broken teeth, a hand being squeezed so hard that a ring caused an indentation in the mother’s finger, and the mother being thrown into a chair, causing her to hit her head on a fish tank.<sup>183</sup> Despite this testimony, and despite the presumption in Louisiana against awarding custody to the perpetrators of domestic violence, the father was granted joint custody and primary residential custody, a decision that was overturned by an appellate court almost a year after the original determination.<sup>184</sup>

In *Gant v. Gant*, the trial court awarded primary physical custody of the

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<sup>179</sup> For a discussion of the application of domestic violence provisions in New York, see generally Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL’Y. 221 (1994); Kim Susser, *Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales In Favor of Protecting Victims and Their Children*, 27 FORDHAM URBAN L.J. 875 (2000). For a discussion of Washington State’s statute in two jurisdictions, see Drye, *supra* note 128, at 241-48.

<sup>180</sup> Vellinga, *supra* note 115, at ¶15.

<sup>181</sup> 733 So. 2d 1261 (3d Cir. 1999).

<sup>182</sup> See *id.* at 1263.

<sup>183</sup> See *id.*

<sup>184</sup> See *id.* at 1267. Two judges dissented, stating that the trial court was entitled to great discretion because of its ability to assess the credibility of witnesses--despite the fact that much of the testimony about the abuse was undisputed. See *id.* at 1267-68.

couple's two children to a husband who, during the course of the marriage, allegedly smashed two watches and a radio with a baseball bat; smashed a television set with a chair; sliced a baseball cap with a box cutter; punched a closet door until it splintered; smacked his wife; poked his wife in the eye, bursting a blood vessel; grabbed his wife by the face and pushed her over the couch while she held a six month-old baby; and threatened to kill his wife.<sup>185</sup> The husband admitted a number of the incidents, but claimed that they had occurred early in the couple's relationship or that the wife exaggerated their seriousness.<sup>186</sup> In this case, the court made no findings about whether domestic violence had even occurred, let alone its impact on the custody decision. The appellate court remanded the case for the trial court to make specific findings of fact as to the occurrence of domestic violence, as required by Missouri law.<sup>187</sup> Trial courts have also failed to give appropriate weight to domestic violence where fathers have:

—struck the mother several times, causing her to fall and sustain an injury requiring stitches (the mother also alleged being threatened with a handgun, which the father disputed);<sup>188</sup>

—pushed and shoved the mother, threw an object at the mother, punched the mother in the face with a closed fist; smashed the mother's diamond ring with a hammer; injured the child by grabbing his elbow and pulling him down a hallway;<sup>189</sup>

—been convicted of misdemeanor battery/domestic violence during a visitation exchange;<sup>190</sup>

—grabbed the mother by the throat and threw her into a room; struck the mother in the face; and pushed the mother out the door (in addition to a number of incidents where both parties were violent);<sup>191</sup>

<sup>185</sup> 892 S.W.2d 342, 343 (Mo. App. 1995).

<sup>186</sup> *See id.*

<sup>187</sup> *See id.* at 347. On remand, the trial court determined that the "husband's attention to the needs of the children and the wife's alleged lack thereto," which included an alleged failure to regularly bathe the children or brush their teeth, outweighed the history of violence by the father. The court of appeals affirmed this ruling. *See Gant v. Gant*, 923 S.W.2d 527 (Mo. App. 1996).

<sup>188</sup> *See Jackson v. Jackson*, 709 So. 2d 46, 48 (Ala. Civ. App. 1997).

<sup>189</sup> *See In Re Marriage of Daniels*, 568 N.W.2d 51, 52-53 (Iowa Ct. App. 1997). During the trial, the mother's counsel was told, "I don't want anymore of this kind of testimony about domestic abuse coming into the record." *Id.* at 55 n.2. In dissent, one judge justified the father's behavior, stating, "Bruce exhibited immature and dangerous behavior in reacting to his wife's extramarital affairs by resorting to punches and shoves." *Id.* at 57.

<sup>190</sup> *See McDermott v. McDermott*, 946 P.2d 177, 178 (Nev. 1997). The trial court stated that it did not approve of the violence but "[understood] the provocation which might have existed." *See id.* at 170.

<sup>191</sup> *See Huesers v. Huesers*, 560 N.W.2d 219, 220-21 (N.D. 1997). The mother alleged a number of other violent acts perpetrated by the father. *See id.* The trial court rationalized the violence perpetrated by the father, stating, "The Court finds those [some of the incidents of violence alleged by the mother] to have happened and there is some mitigation on his part as they were committed after actions by Marla that would have made most reasonable persons commit domestic violence." *Id.* at 223 (quoting the trial court's memorandum opinion). The trial judge further stated, "However, if one looks at the actions of Marla prior to Stuart striking her in those three incidents, there are probably few people who would not have an anger that

—allegedly struck the mother with a closed fist, causing black eyes, in front of the children; threw a beer bottle at her; threatened that if she left him, he would find her, beat her and take the children away permanently; raised his fist to their six year-old son;<sup>192</sup>

—struck the mother and ran out of the house screaming that his family “better get in the house before he tore off his wife’s head”; threw the mother onto the floor and kicked her in the chest, ribs and legs; threw the mother on the floor of a closet, shoved her in the stomach, and kicked her in the side, while she was four or five months pregnant;<sup>193</sup>

—inflicted numerous injuries on the mother, once causing her to lose consciousness and requiring hospitalization; physically and verbally abused the mother’s children from another relationship; threatened to take their common child from the mother in order to keep her in the relationship; abused the mother in the presence of their child; had inappropriate sexual contact with the mother’s daughter; cuffed, pushed, knocked and poked the couple’s son;<sup>194</sup>

—had a criminal conviction for a domestic violence offense; shoved the child into a wall; punched the mother in the stomach while pregnant; threatened the mother’s life; struck the mother in the back of the head and choked her, causing an epileptic seizure; and assaulted a visitation supervisor.<sup>195</sup>

In all of these cases, statutory or case law required the courts to consider domestic violence prior to making a custody determination. The courts simply chose not to follow the law. And it is important to remember that these are only the cases that we know about: the cases that get appealed or are submitted to reporting services. It is impossible to gauge how many hundreds or thousands of children are being denied protection from abusive parents by courts unwilling to apply the law that is designed to safeguard these children. Note that these are also the cases where

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would not rise to violence.” *Id.*

This case is somewhat different from the others described in this section because of the evidence of violence on both sides. The Supreme Court of North Dakota held that where both parties have engaged in violent behavior, the trial court must determine whether the “amount and extent of domestic violence inflicted by one parent is significantly greater than that inflicted by the other” and apply the presumption against awarding custody to the parent who has inflicted the greater violence. *See id.* at 222 (quoting *Krank v. Krank* 529 N.W.2d 844, 850 (N.D. 1995)). The case was remanded for the trial court to make that determination. *See id.*

<sup>192</sup>

*See Lesley v. Lesley*, 941 P.2d 451, 452 (Nev. 1997). This case involved setting aside a default judgment granting custody to the father entered after the mother took the children and fled to California and instituted proceedings there. *See id.* Neither the trial court nor the Supreme Court made findings as to whether the violence occurred; the Supreme Court set aside the default and remanded the case for a custody trial. *See id.* at 456.

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*See Ford v. Ford*, 700 So. 2d 191, 193 (Fla. 1997). The trial court made no findings about the violence in the relationship, but stated “The Court has considered everything that each side has accused the other side of as well as all the good things that each side has presented about themselves.” *Id.* at 196 (quoting the trial court’s opinion). This case also illustrates the problem with “friendly parent” provisions. *See id.* The mother’s alleged failure to facilitate visitation was crucial to the trial court’s determination, but the trial court “failed to recognize the probability that the mother’s actions were justified.” *See id.*

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*See Custody of Vaughn*, 664 N.E.2d. 434, 435 (Mass. 1996).

<sup>195</sup>

*See Russo v. Gardner*, 956 P.2d 98, 99, 102-03 (Nev. 1998).

someone, the battered parent or her counsel, knew to present evidence of the violence. The lack of education about the impact of violence on children and its relevance in custody determinations extends to members of the family law bar.

In a second set of cases, courts have considered evidence of domestic violence but found other factors more central to determinations of custody. For example, in *Patricia Ann S. v. James Daniel S.*, the Supreme Court of West Virginia upheld an award of custody to a father who, the majority acknowledged, had whipped the children with a belt because they found that the father had been the children's primary caretaker.<sup>196</sup> What the majority did not disclose, however, was that the father had also whipped his wife with the belt.<sup>197</sup> Moreover, the father regularly disciplined the oldest child by grabbing his shoulder and pushing him against a wall or tree, bruising his head.<sup>198</sup> The father exercised "total power and control" over the mother, regulating her access to money, for example.<sup>199</sup> The impact on the children, according to the dissenting justice, was clear:

These children learned from their father . . . that it was okay to demean, disobey, and verbally abuse [the mother], and that physical violence awaited those who did not do as he said. The mother reacted with anger, and the father by word, deed, and dollar delivered the message that mommy's crazy and mommy's contemptible.<sup>200</sup>

In *James v. Jill*, the Family Court of Delaware ordered joint legal custody over the mother's objections.<sup>201</sup> Although the father acknowledged that he "might have struck" the mother on one occasion and that he grabbed her and threw her against the wall on another, the absence of further violence in the two years after the parties' separation kept the court from weighing the presence of domestic violence more heavily. The court warned that

[w]hile Father attempts to minimize his actions, he is hereby put on notice that a presumption exists against granting a perpetrator of domestic violence joint custody. Thus, should Father again engage in the conduct that he now attempts to minimize, he will

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<sup>196</sup> 435 S.E.2d 6 (W. Va. 1993). For a compelling argument refuting the majority's application of West Virginia's primary caretaker presumption in this case, see *id.* at 15-18 (Workman, C.J., dissenting). Chief Justice Workman argued that by finding that the father was the primary caregiver despite his long work hours and the myriad contributions of the mother, who gave up her career to stay home with the children, "[t]he majority in essence places a higher value on a father's time and contribution." See *id.* at 16.

<sup>197</sup> See *id.* at 18.

<sup>198</sup> See *id.* at 21.

<sup>199</sup> *Id.* at 19. The mother once had to go to the emergency room after she attempted to take \$20 from the father's wallet and he wrestled with her over it. See *id.*

<sup>200</sup> *Id.* at 22.

<sup>201</sup> No. CN 97-06239, 1998 WL 918829 (Del. Fam. Ct. July 28, 1998).

jeopardize the custodial rights afforded him under this order, and as a result, his relationship with [the child].<sup>202</sup>

Further, while the court acknowledged that the parties should not have a "shared" custody arrangement because of their inability to "communicate effectively," the court ordered an arrangement which required them to "communicate about all major decisions regarding [the child] . . . ."<sup>203</sup> The court essentially slapped the father on the wrist, ordering him not to further abuse the mother (who moved with the child to another state) but refusing to hold him responsible for his past actions.

Even in cases where battering parents have pled guilty to domestic violence offenses, some courts have been reluctant to give those convictions a great deal of weight.<sup>204</sup> In other cases, the mother's past drug usage<sup>205</sup> and the mother's "mental incapacity"<sup>206</sup> overcame the presumptions against awarding custody to a

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*Id.* at \*3.

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*Id.* at \*4. *See also* Zuger v. Zuger, 563 N.W.2d 804, 809-10 (N.D. 1997), where the trial court found that the presumption against joint custody was overcome because: 1) the violence was not directed towards the children; 2) the violence was unlikely to continue since the parties were getting divorced; 3) the children were older, and therefore less at risk of harm from the father's temper; and 4) the risk of violence was minimal because of the age of the children and the proximity of the parties' homes; the parents lived close enough that if the father became violent, the children could go to the mother for protection. The trial court's ruling was overturned on appeal. *See id.* at 809-10.

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*See, e.g.,* Schmidt v. Schmidt, No. CA98-06-037, 1999 WL 225157 (Ohio App. Ct. Apr. 19, 1999); Taraghi v. Spanke-Taraghi, 977 P.2d 453 (Or. Ct. App. 1999). In *Taraghi*, there was, in fact, substantial evidence suggesting that the children's interests would be better served by giving custody to their father. But the trial and appellate courts were both strikingly dismissive of the mother's claims. Despite the fact that the father pleaded no contest to a domestic violence charge, the appellate court found "little evidence in the record to support wife's allegations." *See id.* at 457. The court credited the husband's testimony that he pled guilty on the advice of his lawyer and noted that the wife had written a letter stating that her husband had never harmed her. *See id.* at 456-57. The court discredited the wife's testimony that the letters were written at the request of the husband and his attorney. *See id.* *See also* Sturgill v. Wriston, No. CN93-11820, 1994 WL 838133 (Del. Fam. Ct. Aug. 10, 1994) (court ordered joint custody despite father's six convictions for "terroristic threatening" of mother as well as other abusive behavior). This case is notable for the impact that the violence had on the couple's two year-old son, who began modeling the behavior of his abusive father by calling his mother a "fucking cunt," "fucker," and "dickhead," telling the mother that "daddy is going to kick your ass," and punching his mother in the stomach and face. *See id.* at \*4-7. The court also found that the father repeatedly slapped the child in the head, allowed the child to ride on his motorcycle without a helmet, and essentially had provided no care for the child during the period the parties resided together. *See id.* at \*11-12. Despite all of this, the court stated, "I am satisfied that a joint custody Order is appropriate herein because I believe that the parties should be required to continue to discuss issues involving their child, and that they should be forced to learn to do so in a more amicable and conciliatory fashion than they have done in the past." *Id.* at \*15.

At least one court has found that entry into a domestic violence pretrial diversion program does not constitute a guilty plea or conviction triggering consideration of domestic violence in making custody determinations. *See* Moore v. Moore, No. 93-CA114, 1994 WL 370005 (Ohio App. Ct. July 11, 1994).

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*See* Carver v. Miller, 585 N.W.2d 139 (N.D. Ct. App. 1998).

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*See* Holtz v. Holtz, 595 N.W.2d 1, 4 (N.D. 1999). The Supreme Court of North Dakota also overturned trial court determinations in cases where the mother's problems with "depression, food disorders . . . and low self-esteem" trumped the father's history of domestic violence, which included blackening the mother's eye, slapping her, and rupturing her eardrum, *Bruner v. Hager*, 534 N.W.2d 825, 828, 827 (N.D. 1995), and where the mother's smoking around an asthmatic child was considered more compelling than the father's abuse, which included pulling the mother's hair, punching the mother in the nose, and twisting the



perpetrator of domestic violence.

It is possible, and even probable, that in at least some of these cases the trial court made the appropriate decision despite its failure to consider evidence of domestic violence. That argument misses the point. Statutes and case law requiring courts to consider domestic violence exist in order to protect children from the effects of continued exposure to violence and from the belief that violence is rewarded by the judicial system. By failing to adhere to the spirit, and in some cases the letter, of these laws, courts endanger children and undermine the strong policy message that states intended to send. Even in programs with the most progressive responses to domestic violence like that of Quincy, Massachusetts, judges are the weak link. "Judicial misbehavior presents the most significant obstacle to the Quincy Program's successful operation."<sup>207</sup> And as Chief Justice Workman of the Supreme Court of Appeals of West Virginia noted in *Patricia Ann S. v. James Daniel S.*, "Until judicial officers on every level come to a better understanding of the phenomenon of family violence in its finer gradations, the response of the court system will continue to fall short."<sup>208</sup>

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mother's ankle severely, causing her to seek medical treatment, see *Heck v. Reed*, 529 N.W.2d 155 (N.D. 1995).

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Salzman, *supra* note 42, at 353-54. The problem is not unique to judges. Custody evaluators, *guardians ad litem*, and others within the judicial system must also understand and incorporate their understanding of domestic violence into their recommendations. Evaluators must ask what impact the batterer's violence has had on his relationship with the children and on his ability to parent and whether the harm done by the violence can be undone. See McMahon & Pence, *supra* note 73, at 201. Equally importantly, evaluators need to ask to what extent the problems of the victim are directly attributable to the abuse. The comments of one Minnesota custody evaluator are illustrative:

I needed to decide custody in a family where the man has repeatedly assaulted his wife. Because of the abuse she isn't in good shape. She is chemically dependent and is not being a very good parent. He has a job, he's sober, and he's stable. I know that it's the violence that has done this to her. But given where she's at, compared to him, how can I not give him custody? Even though I know it's not fair to her, isn't it fair to the children?

*Id.* at 200-01; see also The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 220 (1995) (explaining survey showing that custody evaluators and *guardians ad litem* are "the professionals least trained about domestic violence of any actors in the civil justice system.").

I would argue that giving custody to the father in this situation is not necessarily fair to the children. The evaluator does not mention the impact that the father's violence has had on the children. He does not discuss the propensity for further violence. He does not acknowledge that what the children learn from such a decision is that violence is rewarded (in this case, through the custody award of the children).

<sup>208</sup>

435 S.E.2d 6, 15 (W. Va. 1993) (Workman, C.J., dissenting). Karen Czapanskiy suggests that judicial ignorance about domestic violence is only part of the problem, however. Citing state gender bias studies, Czapanskiy argues that gender discrimination is at the heart of why judges fail to give sufficient weight to evidence of domestic violence in custody cases. See generally Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247 (1993).

## B. *The Special Problem of Visitation*

### 1. Examples from Case Law

In perhaps no area is the judiciary so unwilling to apply restrictive laws as in determining visitation. Visitation is looked upon as sacrosanct, an absolute right of the biological parent. Judges almost routinely refuse to consider limiting or even denying visitation to abusive parents, regardless of their behavior. Moreover, judges excoriate custodial parents who try to shield their children from exposure to an abusive parent, suggesting that concern for the child is nothing more than a ploy to deny visitation to the non-custodial parent.

Again, an anecdote illustrates the point. While sitting in court one day, I watched two unrepresented parties at a hearing to modify a civil protection order. The father asked to increase his visitation; the mother stated that while she did not oppose visitation, she had concerns about the child's response because the child had been traumatized by witnessing the violence perpetrated by the father. The judge grew incensed, yelling that the mother would not be permitted to block the father's visitation, that the mother would be held responsible if the visitation did not go well, and that the mother could potentially lose her child if she continued to attempt to withhold the child. The mother protested that these were not her goals; she simply wished to express that the child had some discomfort with visitation. The judge refused to hear any more from the mother and ultimately ordered more visitation than the father had requested.

In most situations, continued contact with the non-custodial parent after parents separate is incredibly important for children. The analysis changes, however, where one parent has been violent. In that situation, the importance of continued contact has to be weighed against the negative effects of that contact.<sup>209</sup> Usually, the child has no one to present his concerns or fears or, in the alternative, his desire to visit, other than the custodial parent.<sup>210</sup> But when the custodial parent attempts to present the child's viewpoint, she exposes herself to judicial displeasure for opposing visitation.<sup>211</sup>

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See Straus, *supra* note 14, at 231. Some jurisdictions have created tools to help judges make such determinations. For example, the Domestic Violence Visitation Task Force of the Probate and Family Court Department of the Massachusetts Trial Court authored a Domestic Violence Visitation Risk Assessment, which suggests various factors, including the level of violence, both physical and emotional, and the impact upon the children, that judges should consider when making visitation decisions and provides sample questions designed to elicit that information. See generally Domestic Violence Visitation Task Force, *Domestic Violence Visitation Risk Assessment (draft)*, October 1994 (on file with the author).

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This is not to say, however, that custodial parents never use visitation to further their own interests. I have been involved with parents who want to deny visitation but cannot articulate a reason for doing so or do so to punish the abuser. Certainly this is not an appropriate approach to visitation and risks making the children pawns in a power struggle between the parties. Nonetheless, my experience has been that parents who attempt to put forth their children's honest views on visitation are routinely ignored, or worse, chastised for opposing visitation.

Giving the child someone else to voice these concerns is discussed in Part IV, *infra*.

<sup>211</sup>

Custodial parents also have an interest in making sure that they are protected from violence during the visitation, which may also be seen as an attempt to interfere with the rights of the non-custodial parent.

Commentators have suggested standards for determining whether and what type of visitation is appropriate between an abusive parent and a child. Some start from the proposition that by virtue of his abusive behavior, "ideally, the batterer should get no visitation."<sup>212</sup> A total denial of visitation, however, is unlikely; "most courts are reluctant to deny visitation to even the most abusive parents . . . ."<sup>213</sup> Therefore, most commentators advocate for supervised visitation until the abuser has completed a specialized domestic violence program, does not threaten or become violent for a substantial period of time, or proves that he is no longer a threat to the physical or emotional safety of the child or the custodial parent.<sup>214</sup> Visitation should take place "preferably . . . at a supervised visitation center where staff understand domestic violence, child abuse, and child development and will carefully monitor visitation."<sup>215</sup> If such a center is not available, visitation should be supervised "by someone who truly will protect the children from psychological manipulation as well as physical and sexual abuse."<sup>216</sup> Looking to family members to supervise visitation is an impractical and potentially dangerous solution. The relatives of the abused person may not want to have any interaction with the batterer; the batterer's relatives may be unable to control his actions or unwilling to "intrude" on the batterer's time with his child. Moreover, the supervisor should not be someone easily manipulated by the batterer, again suggesting that family members are not appropriate.<sup>217</sup> In some situations it is appropriate to suspend visitation altogether: where the child is too distressed, even in a protected setting, or where the violent parent threatens to harm or flee with the child.<sup>218</sup> Visitation should be structured so as to minimize the child's exposure to parental conflict, should require infrequent transitions between parents where there is ongoing

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See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 40.

<sup>212</sup> Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 427 (1991) [hereinafter Zorza, *Woman Battering*].

<sup>213</sup> Joan Zorza, *Using the Law to Protect Battered Women and Their Children*, 27 CLEARINGHOUSE REV. 1437, 1440 (1994) [hereinafter Zorza, *Using the Law*].

<sup>214</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 99; Saunders, *supra* note 10, at 5; see also DAVIDSON, IMPACT, *supra* note 24, at 14 (suggesting that where there is proof of severe or repetitive abuse, there should be a rebuttable presumption that visitation be supervised).

<sup>215</sup> Zorza, *Using the Law*, *supra* note 213, at 1440. Visitation centers will be discussed in Part II.B., *infra*.

<sup>216</sup> Zorza, *Woman Battering*, *supra* note 212, at 427.

<sup>217</sup> See Crites & Coker, *supra* note 162; see also Zorza, *Using the Law*, *supra* note 213, at 1440 ("Because so many parents of abusive spouses are also abusive, feel overly guilty about their child's abusive behavior, or feel afraid of their abusive child, it is generally unwise for the grandparents to supervise visitation."). Louisiana law recognizes the necessity of finding an appropriate supervisor. See LA. REV. STAT. ANN. § 9:362(6) (West 1998) (forbidding a relative, friend, therapist or associate of the batterer from acting as a visitation supervisor).

<sup>218</sup> See Saunders, *supra* note 10, at 5; Straus, *supra* note 14, at 239. At least one commentator has also suggested that in some cases, visitation be suspended until the custodial parent resolves her anger at the non-custodial parent and feels safe. This need to sacrifice immediate visitation to facilitate the victim's recovery should be seen in the context of the violence perpetrated by the abuser and not as an attempt to interfere with the abuser's right to visitation. AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 101.

conflict and a reasonable fear of violence, and should acknowledge that spending substantial amounts of time with both parents is not always healthy for the child.<sup>219</sup>

Courts are reluctant to employ these methods for safeguarding children during visitation. They fail to consider safety concerns, and don't appoint appropriate supervisors for supervised visitation.<sup>220</sup> They are even more reluctant to curtail visitation, even when credible evidence of the child's fear or the parent's propensity for violence exists. Three cases illustrate the trial court's reluctance to "infringe" on the non-custodial parent's right to visitation even in the most extreme circumstances.

In *Mary Ann P. v. William R. P.*, a family law master heard evidence of the physical and mental abuse perpetrated by the father against the mother, with the children as witnesses.<sup>221</sup> The mother testified that the father had a violent temper and cursed at her in front of the children "so frequently that even when the boys were just learning to talk they said explicit curse words."<sup>222</sup> The father punched and kicked the mother, threatened her with a knife, choked her, and dragged her across the floor by her hair in front of the children.<sup>223</sup> He hit and kicked the children's toys and broke toys in front of the children.<sup>224</sup> He locked the mother out of the house and kept the children inside with him.<sup>225</sup> When the children witnessed the abuse of their mother, they would scream, cry and try to hide.<sup>226</sup> Further, evidence was presented to the court that the six year-old boy had been sexually abused by the father.<sup>227</sup> There was also testimony that the boys disliked their father, did not want to visit their father, and demonstrated anger by hitting the father.<sup>228</sup> Three experts testified that the children should not be forced to see their father.<sup>229</sup>

The family law master and the appellate court disagreed.<sup>230</sup> The family law master stated:

It is clear that no sexual abuse occurred in this case, that plaintiff does not like the defendant, and justifiably so because of the history of physical violence in their marriage, but that there can be

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<sup>219</sup> See Saunders, *supra* note 10, at 5.

<sup>220</sup> See Zorza, *Protecting the Children*, *supra* note 9, at 1125.

<sup>221</sup> 475 S.E.2d 1, 3 (W. Va. 1996).

<sup>222</sup> *Id.*

<sup>223</sup> See *id.*

<sup>224</sup> See *id.*

<sup>225</sup> See *id.*

<sup>226</sup> See Mary Ann P., 475 S.E.2d at 3.

<sup>227</sup> See *id.* at 3-4.

<sup>228</sup> See *id.* at 4.

<sup>229</sup> See *id.* at 4-5.

<sup>230</sup> See *id.* at 4-5.

no further justification whatsoever of any restriction of defendant's right of visitation with his children.<sup>231</sup>

The Supreme Court of Appeals of West Virginia, however, overturned the earlier decisions, finding that "[t]he evidence of the negative impact the physical abuse that occurred during the marriage had in regard to the children's well-being was not rebutted."<sup>232</sup> It stated that domestic violence appeared to be the "root cause for why visitation has not been successful" and held that the children should not be forced to visit with their father.<sup>233</sup>

Two years later, the Supreme Court of Appeals of West Virginia was again confronted with a case where the family law master and appellate court both ignored substantial evidence of domestic violence in determining visitation. In *Dale Patrick D. v. Victoria Diane D.*, the family law master heard "a significant volume of evidence" about the father's "violent proclivities."<sup>234</sup> The evidence included the following:

—the father's admission that he threw the mother down and hit her on the buttocks with an open hand;

—the father's admission that he climbed on top of his wife, holding her shoulders and legs down and leaving bruises on her body;

—testimony that the father threw a can of beer at the mother, dragged her across the floor, threw her on the floor and banged her head against the floor;

—testimony that the father carried and dragged the mother's son up the stairs, holding him by his feet and ankles and dropping him head first at the top of the stairs;

—testimony that the father pushed the mother's daughter while she held the child at issue in this matter, causing the daughter to fall and drop the child;

—testimony about threats and verbal abuse;

—testimony about the father's repeated use of profanity and the father's testimony that "profanity and retaliation is necessary;"

—testimony about the father's "hostile behavior" towards his first wife.<sup>235</sup>

The Supreme Court of Appeals of West Virginia stated that it was "greatly troubled by the history of domestic violence and the absence of meaningful lower court attention to the impact of such violence upon [the father's] visitation rights."<sup>236</sup> The court remanded the case for evaluation of the potential for domestic

<sup>231</sup> Mary Ann P., 475 S.E.2d at 5.

<sup>232</sup> *Id.* at 7. The Supreme Court held that it could not find that the factual determination that no sexual abuse had occurred was clearly erroneous and declined to overturn that part of the lower court's ruling. *See id.* at 6. This finding spurred a concurrence from Justice Workman, who, while agreeing with the final result, vehemently argued that the family law master's determination that no sexual abuse had occurred was clearly erroneous. *See id.* at 9-10.

<sup>233</sup> *Id.* at 8.

<sup>234</sup> 508 S.E.2d 375, 379 (W. Va. 1998).

<sup>235</sup> *Id.* at 381 n.1 (Workman, J. concurring in part and dissenting in part).

<sup>236</sup> *Id.* at 379.

abuse and a determination as to whether visitation comported with the best interest of the child.<sup>237</sup>

The trial court in *Michelli v. Michelli* awarded unsupervised visitation to a father despite at least eight separate incidents of violence over a six year marriage, and despite Louisiana's clear statutory mandate that in cases with a history of family violence, the perpetrator should be awarded only supervised visitation.<sup>238</sup> The father struck the mother in the face, causing a cut over her right eye and possibly a broken nose; pushed her and called her names including slut and whore; hit her in front of the child, causing the child to run from the home screaming for help; punched the daughter in the stomach and later shook the daughter to prevent her from telling her mother about being punched; cursed at the mother, threatened to rape her and attempted to pull her legs apart; threw the mother, who was holding their son, to the floor, cut her fingers pulling the car keys from her hand, and grabbed her by the neck and choked her, leaving red marks on her neck; hit the mother's legs, grabbed her hair and banged her head against the window and dashboard of the car; and beat the mother and threw her out of a hotel room during a family vacation.<sup>239</sup> The father did not deny that the violence occurred.<sup>240</sup> The trial court found that the mother had been violent because she had defended herself during some of these incidents and concluded that "sporadic acts of violence committed by both parties do not rise to the level sufficient to trigger [the presumption against unsupervised visitation]."<sup>241</sup>

The Court of Appeals disagreed, pointing out that seven of the eight incidents described by the mother and her witnesses constituted batteries and that these seven incidents established a history of violence.<sup>242</sup> The court noted that one could "reasonably assume that child visitation would be the new forum for abuse of the child or the abused parent," especially where, as here, the violence had escalated over time and some of the violent acts occurred in the presence of the children.<sup>243</sup>

What is so striking about these cases is both the level of the violence and the unwillingness of the trial courts (and in the West Virginia cases, the appellate court) to consider how the overwhelming evidence of domestic violence should impact upon their visitation orders, despite substantial and unequivocal case law and/or statutes requiring them to do so.<sup>244</sup> Individual judges are the weak link in the

<sup>237</sup> See *id.* at 380.

<sup>238</sup> 655 So. 2d 1342, 1346 (La. Ct. App. 1995).

<sup>239</sup> See *id.* at 1346-47.

<sup>240</sup> See *id.* at 1348 n.5.

<sup>241</sup> *Id.* at 1348.

<sup>242</sup> See *id.* at 1349.

<sup>243</sup> See *Michelli*, 655 So. 2d at 1346.

<sup>244</sup> Interestingly, the same West Virginia appellate court judge, Judge Herman Canady of the Circuit Court of Kanawha County, approved the visitation orders in both West Virginia cases. Clearly, having his

system designed to protect children from violent homes in custody and visitation decisions. Judges need to move beyond rote recitations of the best interest standard and consider whether visitation is in the child's interest at all, and if so, how children can be adequately protected from harm.<sup>245</sup> Laws alone, without judicial education, and more importantly, real understanding of the impact of witnessing domestic violence on children and application of that understanding to judicial rulings, will never protect children from the harm associated with abusive parents.

## 2. Supervised Visitation Centers

Judges have a number of options available to them to safeguard children when making visitation decisions. One of these options is supervised visitation. Throughout the country, communities are creating sites where visitation can take place in a safe and supervised setting. The next section will discuss the justifications for creating visitation centers, describe the specifications of such centers, provide examples of successful centers, and advocate for the creation of centers in each community where abusive parents visit with their children.

### a. Why Supervised Visitation Centers?

The threshold question for any judge making a visitation decision in the context of family violence should be whether there should be any contact between a child and a parent who has abused his partner.<sup>246</sup> In reality, however, the question is

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decision overturned in the earlier case did not change his approach in the later one. For a general discussion of state custody and visitation statutory provisions involving domestic violence and specifically, judges' unwillingness to restrict visitation, see The Family Violence Project of the National Council of Juvenile and Family Court Judges, *supra* note 207, at 216 ("Few judges impose protective limitations on visitation in the context of domestic violence, and fewer limit access to supervised visitation.").

<sup>245</sup>

Whether a child has an independent right to visitation, and a corresponding right to refuse visitation, is an issue deserving of more attention. Although a parent's right to the company of the child has been given constitutional protection, that right is not absolute. A child's right to safety, security, and self-determination can trump the parent's right—for example, where the child cannot be adequately protected during visitation or where visitation would cause emotional or physical trauma to the child. Such determinations are frequently made in the context of child abuse cases (although given the focus on family reunification, courts are still hesitant to suspend all visitation), and that same reasoning should extend to other kinds of cases. As Justice Workman noted in *Dale Patrick D. v. Victoria Diane D.*,

The record here reflects an individual with deep-seated problems, who at a minimum has a substantial temper control problem with a proclivity for violence and who indeed may even be very dangerous. Although such an individual should not be deprived of the opportunity to have a relationship with his child, that child also has rights. She is entitled to protection as best the legal system can afford, for her safety has been placed in our hands.

508 S.E.2d 375, 381 (W. Va. 1998). By the same token, a child's desire to visit with an abusive parent should be honored if it can be achieved in a manner that is safe for the child. If the child has an independent right to visitation, "[j]udges should not use parent and child contacts as the sanction for violations of court orders or for behavior modification purposes because the court is uncomfortable using its contemptive power against batterers." Rabin, *supra* note 52, at 1117.

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See Straus, *supra* note 14, at 237. For a discussion of the factors to be considered when determining whether a parent who has perpetrated domestic violence should be permitted to visit, see generally Carla Garrity & Mitchell A. Baris, *Custody and Visitation: Is It Safe? How to Protect a Child From*

somewhat academic—courts routinely order visitation where partner abuse has occurred.<sup>247</sup> The real decision for most judges is whether visitation will be supervised or unsupervised.

Supervised visitation is “contact between a child and adult(s), usually a parent, that takes place in the presence of a third person who is responsible for ensuring the safety of those involved.”<sup>248</sup> Courts can require supervised visits, but finding appropriate supervision can be problematic. As discussed above, enlisting the assistance of the non-custodial parent’s family is often not advisable, and the victim may have few relatives or friends willing to supervise the batterer.<sup>249</sup> If a supervisor cannot be found, courts are forced to choose between cutting off access to the child and allowing the non-custodial parent unfettered access to the child, at the risk of physical or emotional abuse to the child.<sup>250</sup> Supervised visitation centers fill this gap by taking on the responsibilities of the third party, providing

a safe, neutral setting in which contact between a child or children and an adult, usually a parent, can be monitored by trained personnel able to protect the rights of the child. . . . All visitation centers have the purpose of allowing parental contact, assuring the safety of the child, and keeping an objective or accurate record of events.<sup>251</sup>

Creating supervised visitation centers can make supervised visitation a viable

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*an Abusive Parent*, FAM. ADVOC., Winter 1995, at 40. In their continuum of family conflict severity, exposure to domestic violence constitutes “moderately severe conflict,” with ongoing family violence creating a “high risk situation.” *Id.* at 42-43.

<sup>247</sup> See Straus, *supra* note 14 at 239-40; see also Zorza, *Using the Law*, *supra* note 213, at 1440.

<sup>248</sup> Straus, *supra* note 14 at 229. It is important to note at the outset, however, what supervised visitation is not: “a substitute for difficult decisions by the family court.” See *id.* at 235. Family courts should not use supervised visitation to avoid suspending visitation when such a choice is appropriate, or, in the alternative, to deny a parent fuller access to a child absent justification. Moreover, supervised visitation centers do not offer “long-term solutions to visitation problems in most family court cases;” they should not be thought of as a substitute for addressing the underlying problems that resulted in the need for supervised visitation in the first place. See Karen Oehme, *Supervised Visitation Programs in Florida: A Cause for Optimism, A Call for Caution*, 71 FLA. B.J., February 50, 55 (1997).

Supervised visitation centers are not universally popular. Men’s groups have argued that “because the majority of restricted visitors happen to be fathers, these programs are ‘anti-male.’” Debra A. Clement, *A Compelling Need for Mandated Use of Supervised Visitation Programs*, 36 FAM. & CONCILIATION CTS. REV. 294, 307 (1998). Others believe that no matter how “child-friendly” the centers are, the atmosphere is still artificial and restrictive. See Oehme, *supra*, at 54. One parent described a center as “a jail with carpet,” citing its strict requirements. *Id.*

<sup>249</sup> See Vellinga, *supra* note 115, at ¶ 61; Oehme, *supra* note 248 at 239; see also Clement, *supra* note 248 at 298 (arguing that state legislatures should mandate supervised visitation in certain types of cases and establish and fund supervised visitation centers statewide).

<sup>250</sup> See Straus, *supra* note 14, at 233.

<sup>251</sup> Bonnie S. Newton, *Visitation Centers: A Solution Without Critics*, FLA. B. J., Jan. 1997, at 54, 56 (emphasis omitted).



option for the first time.<sup>252</sup>

Decreasing the risk of further violence between the parties is a second justification for creating supervised visitation centers. The time immediately following an abused partner's decision to end a relationship is generally the time when there is the highest risk of violence. But this is also the time when decisions about visitation are being made. And other than court appearances, pick-ups and drop-offs for visitation are the only time that an abuser under a restraining order has sanctioned access to the victim.<sup>253</sup> Courts often seem to craft visitation orders without considering the matter that brought the parties before the court in the first place. "[A] man who has battered his partner, and a woman who has been battered, are expected to negotiate a visitation schedule, organize intricate details of exchanging children, meet somewhere, and exchange the children without threat, conflict, or dispute."<sup>254</sup> The result? "[T]his discounting of the reality of violence puts women and children at risk."<sup>255</sup> Moreover, children are emotionally damaged by further violence. Children feel responsible for the violence that occurs when a non-custodial parent is present for the express purpose of visiting with the child.<sup>256</sup> And children are further traumatized by the acrimony between their parents that is manifested during visitation.<sup>257</sup> Children also perceive and react to the stress that the custodial parent feels around visitation; supervised visits in a safe setting can alleviate the custodial parent's anxiety, relieving the child of trauma.<sup>258</sup>

Another goal of supervised visitation centers is to provide emotional support for the child during visitation. "[C]hildren going from an abused to a previously abusive parent during a visit must make a transition which is far greater than the physical distance they cross."<sup>259</sup> The child is trying to maintain her loyalty to one parent without losing contact with the other.<sup>260</sup> The supervised visitation center gives the child the opportunity to maintain the bond with the non-custodial parent in a safe setting. In addition, visiting may help the child to develop a realistic assessment of the non-custodial parent. When children lose contact with a parent, they often blame themselves and create idealized versions of the parent; part of this

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<sup>252</sup> Where supervised visitation centers are available, they are generally very well subscribed. One survey of New York City's Family Court judges found that demand for visitation center services was 12% higher than capacity. Straus, *supra* note 14 at 233; *see also* Clement, *supra* note 248, at 301-02 (describing how demand for outstrips supply of supervised visitation centers).

<sup>253</sup> *See* Straus, *supra* note 14 at 232. In Duluth, Minnesota, in 1988, almost one-third of the violations of protective orders and probationary stay away agreements occurred during visitation or the pick-up or drop-off for visitation. *See* McMahon & Pence, *supra* note 73, at 195.

<sup>254</sup> McMahon & Pence, *supra* note 73, at 193.

<sup>255</sup> *Id.*

<sup>256</sup> *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 40.

<sup>257</sup> *See* Straus, *supra* note 14, at 232.

<sup>258</sup> *See id.* at 238.

<sup>259</sup> *Id.* at 240.

<sup>260</sup> *See id.*

process involves repressing the memories of the violence.<sup>261</sup> Children who are able to visit with abusive parents can learn to accept the parent without needing to wish away his behavior, a position that is emotionally much healthier for the child. The center's job is to empathize with and support the child, broadcasting the message that "whatever has happened, things are going to work differently and safely here."<sup>262</sup>

Finally, supervised visitation centers help to highlight the belief that the community's response to domestic violence must integrate the needs of children. Although opening a visitation center does not eliminate or resolve issues of custody and visitation, it does make these issues more "visible and urgent."<sup>263</sup> In Duluth, Minnesota, for example, "part of the Center's role was to intervene in and influence the process of reordering family relationships from the standpoint of those who had been harmed by violence. This decision put the children's viewpoint at the center of the program's focus, but in a way that did not treat children as separable from their primary relationships."<sup>264</sup> Visitation centers spur communities to recognize the impact of violence on children and to consider creative ways of addressing the harm done by exposure to violence.

#### b. Operating a Visitation Center

Although there is widespread variation among centers, most share some basic traits. Most centers provide "one-on-one" supervision of visits, with an observer present at all times, as well as "exchange" services, allowing parents to transfer their children at the beginning and end of visits.<sup>265</sup> Other programs include "off-site" supervision, with the supervisor accompanying the parent and child to a location away from the center (like a park or a family event), monitoring of telephone calls between children and parents, education and support groups, parenting skills classes and referrals to health, legal and social services.<sup>266</sup>

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<sup>261</sup> See *id.* at 239. Some critics assert, however, that supervised visitation with an abuser is inherently damaging. They contend that by acting as though things are normal during the visit and not confronting the batterer about his behavior, the supervisor implies her approval of the batterer, which helps to destroy the child's sense that the abuse was real and unacceptable. See Straus, *supra* note 14, at 238. The logical conclusion of this position is that batterers should never be permitted visitation, a position that I cannot accept. Many children understand that violence is wrong and yet long to see their parents; "children in most situations want the abuse to stop; they don't want to lose a parent." *Id.* at 239. Many of my child clients have articulated just this position.

<sup>262</sup> *Id.* at 240-41.

<sup>263</sup> McMahon & Pence, *supra* note 73, at 202.

<sup>264</sup> *Id.* at 192.

<sup>265</sup> See Straus, *supra* note 14, at 234. One of the most valuable functions served by supervised visitation centers is their availability for exchanges. When such services are not available, parents are frequently ordered to exchange children in public settings, most notably police stations. But being exchanged at a police station can be scary for the child. Moreover, the police are not always supportive, and if they are not, the exchange isn't really secure. See *id.* at 251.

<sup>266</sup> See Clement, *supra* note 248, at 299; Newton, *supra* note 251, at 56; Straus, *supra* note 14, at 234.

Centers set guidelines both for themselves and for the parents they serve. Centers should not take families that are unreasonably dangerous; should have copies of all outstanding court orders; should keep identifying information separate from the rest of the file, so that it is not inadvertently given to the abusive parent; should conduct an intake with all members of the family to identify issues of family violence; and should give parents written guidelines and require them to sign agreements binding them to those guidelines.<sup>267</sup> Guidelines for parents are designed to keep the child, parents, and center staff safe, describing what is and is not acceptable behavior at the center and during visits (for example, making derogatory comments about a parent or whispering to the child is not acceptable), requiring parents to stagger their arrival and departure times so as not to have contact, mandating that parents not have physical or visual contact during their time at the center, and establishing security measures, including security guards and metal detectors.<sup>268</sup> Centers also establish rules governing interaction between the child and non-custodial parent and specify when gifts may be given or photographs taken. Further, the rules educate parents about the child's feelings of anger or responsibility related to the violence and about the need to prepare the child to visit with the non-custodial parent.<sup>269</sup>

Both parents play an active role in ensuring that visits are successful for the child. The visiting parent must show a willingness to care about the child regardless of what the child says or believes, and must not threaten the child or contradict the child's perceptions; the custodial parent must accept that contact with the other parent may benefit the child and not threaten to withdraw affection if the child visits or enjoys the visits.<sup>270</sup> Affirming the child's right to develop and/or maintain healthy relationships with both parents is the key to establishing successful visitation; "neither parent should be allowed to contradict a child's statements or expressions of feeling about the other parent."<sup>271</sup>

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<sup>267</sup> See Straus, *supra* note 14, at 245-46. In addition to keeping identifying information away from visiting parents, visitors should not be permitted to ask the child where she lives or plays, where she goes to school, how she got to the visit, or any question that would allow the visitor to discern where the custodial parent and child are living. See *id.* at 248.

<sup>268</sup> See *id.* at 245-46.

<sup>269</sup> See Clement, *supra* note 248, at 299. For examples of these guidelines, see BROCKTON FAMILY AND COMMUNITY RESOURCES, INC., DOMESTIC VIOLENCE ACTION PROGRAM, THE VISITATION CENTER: GUIDE FOR SUCCESSFUL VISITATION (on file with the author). Some centers feel strongly that it is the child's right to be free of unwanted physical contact; this concept is embodied in Brockton's Children's Rights Policy (which was adopted by the D.C. Superior Court's center), which does not permit constant touching and requires that the child's feelings about physical contact be regarded. Certainly where there are questions of physical or sexual abuse, physical contact should be restricted and should only be initiated by the child. See Straus, *supra* note 14, at 247.

<sup>270</sup> See Straus, *supra* note 14, at 240. There is some question as to whether programs should take sides with parents, openly supporting the battered woman and condemning the behavior of the batterer. Some argue that programs that take this approach may recreate family conflict and loyalty issues for the child, which can negatively impact on the visit. Others believe that programs that condemn the batterer help the child develop a healthy emotional reaction to the abuse and allow the child space to express negative feelings about the batterer's behavior. See *id.* at 241. This is similar to the debate described at note 261, *supra*.

<sup>271</sup> See Straus, *supra* note 14, at 247.

Prior to beginning the visits, most centers require the parents to complete an intake process. During that process, center staff should explain the purpose of the supervision and the need to support the child's feelings and perceptions.<sup>272</sup> Center staff may also take a family history and discuss the guidelines with parents. Some centers require parents to sign a copy of the center rules, indicating their acceptance of the terms of visitation.<sup>273</sup> Most centers schedule visits lasting between one and two hours and adhere to rigorous schedules for arrivals and departures. The visiting parent comes at least fifteen minutes prior to the visit and is taken to the visitation room; the child and custodial parent come at the appointed time, and the custodial parent either leaves or goes to a waiting room to which the visiting parent does not have access.<sup>274</sup> The process is reversed at the end of the visit, with the visiting parent waiting at least fifteen minutes in order to allow the custodial parent and child to leave safely.<sup>275</sup>

Supervisors and center staff range from licensed mental health professionals to volunteers.<sup>276</sup> The majority of supervised visitation programs use volunteers, especially degree candidates in social work, psychology, or related disciplines, to supervise visits.<sup>277</sup> Staff should be trained on family violence, how to supervise visits, recognizing danger and intervening appropriately.<sup>278</sup> Supervisors are also required to record their observations of the parent/child interaction during the visit, including how visits started and ended, what activities the child and parent engaged in, and whether either parent exhibited inappropriate behavior.<sup>279</sup> Center staff are frequently asked by judges and by counsel for parents and children to report on how visitation is progressing.<sup>280</sup> On-site visits generally occur in semi-

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<sup>272</sup> See *id.* at 238.

<sup>273</sup> See, e.g., BROCKTON FAMILY AND COMMUNITY RESOURCES, INC., THE VISITATION CENTER GROUND RULES (on file with the author); DISTRICT OF COLUMBIA SUPERIOR COURT, VISITATION CENTER GROUND RULES; NORTHERN VIRGINIA FAMILY SERVICES, CONTRACT FOR VISITATION SERVICES.

<sup>274</sup> See Straus, *supra* note 14, at 234-35; see also BROCKTON FAMILY AND COMMUNITY RESOURCES, INC., THE VISITATION CENTER GROUND RULES (on file with the author); DISTRICT OF COLUMBIA SUPERIOR COURT, VISITATION CENTER GUIDELINES; NORTHERN VIRGINIA FAMILY SERVICE VISITATION SERVICES PROGRAM, GUIDELINES FOR SUPERVISED VISITATION SERVICES.

<sup>275</sup> See Straus, *supra* note 14, at 234-35. These rules are generally the same for visitation exchanges.

<sup>276</sup> *Id.* at 235.

<sup>277</sup> See *id.*; see also Newton, *supra* note 251, at 56.

<sup>278</sup> See Straus, *supra* note 14, at 244; see also Newton, *supra* note 251, at 56.

<sup>279</sup> See, e.g., BROCKTON FAMILY AND COMMUNITY RESOURCES, INC., Observation Form (on file with the author).

<sup>280</sup> See Clement, *supra* note 248, at 299; Straus, *supra* note 14, at 234. Straus believes that while centers should provide notes about the supervisor's observations, it is not appropriate for center staff to make recommendations about how visitation should progress in the future.

A parent's behavior with a third person in the room for a maximum visit of two hours is not enough basis to predict how that parent will behave with a child during an extended, unsupervised contact . . . a program should preface any report or observation note submitted to a referring agency with a large print CAUTION. Straus, *supra* note 14, at 242, 248. See also Oehme, *supra* note 248, at 55:

private settings with toys and books for children and adults to use during the visit.<sup>281</sup>

Centers are developed and financed by a range of individuals and organizations. Community groups, courts, attorneys, social workers, churches and legislatures have contributed to their inception and growth. Some centers are privately or foundation funded; others receive public funds for operating costs.<sup>282</sup> Although some charge for services, few could fully fund themselves using a pure fee-for-service model.<sup>283</sup>

### c. A Case Study

The District of Columbia Superior Court's Supervised Visitation Center is a fairly typical example of both the important contribution a center can make to ensuring the safety of children and the difficulties of initiating such a project.

In 1995, the District of Columbia Superior Court developed the reorganization plan that would ultimately create the Domestic Violence Unit. At that time, advocates for battered women suggested that the court create a supervised visitation center, citing problems with finding appropriate supervisors and the need for a safe and appropriate atmosphere in which visitation could take place.<sup>284</sup> The advocates made concrete proposals about how referrals would be made, how the center would be organized, what activities should be available, and how the program should be evaluated.<sup>285</sup> Two years later, the Court began soliciting and ultimately received federal grant funding for a supervised visitation center pilot project.<sup>286</sup> In late 1997, the District of Columbia Superior Court Domestic Violence Coordinating Council's Children's Subcommittee took responsibility for

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[L]awyers and judges should not assume that a report of a non-custodial parent's good conduct at the visitation site is a signal that the original problems that resulted in a referral for supervision have been adequately addressed. These sessions do not offer visitation center staff a view of parents outside of a highly structured, short-term observation.

Given that many of the staff are volunteers, moreover, courts should not assume that the supervisor has any special expertise in forecasting the future of the visitation. *But see* Clement, *supra* note 248, at 310 (suggesting that courts modify or expand visitation rights upon, among other factors, documentation from a supervised visitation program "indicat[ing] a prospering parent-child relationship.").

<sup>281</sup> See Clement, *supra* note 248, at 299. The most common complaint among children, however, is that they are bored because the programs lack "sufficient toys or activities." *Id.*

<sup>282</sup> See *id.* at 302-05; Newton, *supra* note 251, at 56-57. Both describe a variety of program models. For a detailed discussion of supervised visitation centers in Florida, see Oehme, *supra* note 248, at 50-52, and in Duluth, see McMahon & Pence, *supra* note 73.

<sup>283</sup> See Clement, *supra* note 248, at 302.

<sup>284</sup> See Memo from Raquel Fonte, Donna Gallagher and Stacy Brustin to Sharon Dinero, May 3, 1995, at 1 (on file with the author).

<sup>285</sup> See *id.* at 2-6.

<sup>286</sup> See Letter from Chief Judge Eugene Hamilton to Assistant Attorney General Laurie Robinson, May 23, 1997 (on file with the author). The Court ultimately received funds from the Violence Against Women Act's Grants to Encourage Arrests Policies and through the District of Columbia's Office of Paternity and Child Support Enforcement (now Child Support Enforcement Division).

coordinating the opening of the center, although authority for running the center remained with the Court itself.<sup>287</sup> Members of the Children's Subcommittee, composed of court staff, advocates for battered women and children, representatives from the U.S. Attorney's Office, and social service professionals and counselors, collected resumes and interviewed candidates for staff positions, created guidelines and rules for the center, and participated in staff training.<sup>288</sup> The training included sections on child development, parenting skills and communication, child abuse and neglect, domestic violence, substance abuse, confidentiality, observation skills, and center operations. Because the staff had full-time jobs in addition to their part-time work at the center, the training was squeezed into two days.

In July 1998, the center opened for initial interviews with parents. Referrals came solely from the Domestic Violence Unit of the District of Columbia Superior Court, and, at first, came slowly. The center was open for eighteen hours weekly: Wednesday, Thursday and Friday evenings, and Saturday and Sunday during the day. One and two hour visitation slots were available. The center also supervised exchanges for visitation. By July 1999, fifty families were using the center for supervised visits and for weekend exchanges. Word of the center's existence spread to other branches of the Family Division of the Superior Court, and judges in those branches began asking to make referrals as well (although the center generally continued to require a referral from the Domestic Violence Unit).

The initial year of operation has not been entirely seamless. The center is housed in a space that is used by other court programs during the day. As a result, toys and decor must be temporary and are moved into place during operating hours.<sup>289</sup> Staff, who work eighteen hours at the center weekly in addition to their full-time jobs, are struggling with burn-out. Staff frequently are caught between angry and hostile family members; accusations that a child is being abused are common and cause distress for the staff, who are mandated reporters of child abuse and neglect. Staff have repeatedly been asked to testify in court (although judges are beginning to allow the center's observation reports into evidence as court records in lieu of having the staff member testify). Funding for the center was held up for months; center staff were being paid by the court rather than through the grant money budgeted for the center. Without the back-up from the court system, they would not have been paid at all. Advocates have complained that staff have

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Dr. Cheryl Bailey of the District of Columbia Superior Court (and a member of the Children's Subcommittee) handled the majority of the planning for the center, writing grants and creating work plans, working with the court to get job descriptions, finding space within the court, and ultimately, taking calls for the center and talking with parents during the hours that the center was not open. The center would not have opened without her efforts. As Chair of the Children's Subcommittee, I had the opportunity to work closely with Dr. Bailey and have also had access to much information about the operation of the center. This section is largely based on my observations from my participation in the inception and operation of the center.

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The guidelines, rules and other forms were adopted largely from those of Brockton Family and Community Resources, Inc. and Northern Virginia Family Services. *See supra* notes 269, 273-274.

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Although the center is still a pilot project, the original plan, even during the pilot phase, was to have a permanent space that would be decorated in a way that would ease and comfort the children and make the center an inviting place in which to visit.

disclosed information to non-custodial parents that jeopardized the safety of their clients.<sup>290</sup> Parents (both custodial and non-custodial) have complained that visiting in the center is an artificial experience. Some parents choose not to have visitation rather than use the center.<sup>291</sup> Other parents complain that staff overly identifies with one parent or the other.<sup>292</sup>

None of this, however, means that supervised visitation centers are a bad idea. To the contrary, judges, advocates and parents all appreciate having a safe alternative for visitation. The majority of parents use the center happily. After an initial period during which healthy relationships between non-custodial parents and children are fostered, some families have left the center to begin unsupervised visitation without further problems. Even if the center were open only for exchanges, it would be providing a huge service to the community; about half of the families using the center are exchange clients. Children no longer have to meet their parents at police stations for want of a safe alternative. Plans to increase the number of staff (to combat burnout), to use volunteers, and to move into a permanent space are all being made. The lessons to be taken from the experience, though, are important: ensuring sufficient staff training, developing a space in which children feel comfortable (not just safe), engendering realistic expectations in parents, securing stable sources of funding. Addressing the issues that arose during the center's first year of operation will guide other systems in developing centers that provide a viable visitation alternative for children and families.<sup>293</sup>

A system that "awards" children and "divides" them between their parents can only be seen as treating children as property, as a system in which children are essentially powerless. This powerlessness is especially harmful for children in family violence cases, who cannot control with whom they will live or visit. When

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Interview with Lydia Watts, Executive Director, Women Empowered Against Violence, Inc., July 7, 1999. One of Ms. Watts' clients called the center to inform them that her child could not come to a visit. When asked to justify missing the visit, the mother explained that the child had been admitted to a psychiatric care facility. In canceling the visit with the father, the center revealed this information. The father (who did not have any form of legal custody, and therefore, no right to the information) and his counsel began badgering the facility and Ms. Watts, demanding information about the child, which caused a great deal of distress for both the child and the parent.

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I have personally been involved in cases where the non-custodial parent has given up his right to visitation rather than use the center, the attitude being, "If I can't go where I want when I want, I won't visit at all." Straus suggests that use of the center distinguishes parents who only want contact with the child in order to manipulate the custodial parent from those who have a genuine connection with their children. See Straus, *supra* note 14, at 239. I tend to agree with him.

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Interview with Lydia Watts, *supra* note 290. Ms. Watts described a situation where the father arrived late, causing him to meet the mother at the door. The mother, who is terrified of the father, began screaming, prompting the security guard to escort her in. Center staff never filed a report, and when asked why they hadn't, explained that although she seemed upset, they did not see the incident and were unwilling to report her reaction (although presumably they must have known that the father was late for his visit). Failing to report infractions of the center's rules leads parents to believe that the center is "on his/her side."

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It is important not to lose sight of the larger goals, however. Although visitation centers can help shield children from violence, "we must develop a clearer understanding of the role violence and power play in shaping the social relationships of families; otherwise, these centers may become administrative and managing agencies of a legal system that makes visitation centers new sites of damage to children and their mothers." McMahon & Pence, *supra* note 73, at 187.

the legal system disregards evidence of family violence in making custody determinations or ignores potential solutions to the special problems posed by visitation with a violent parent, it highlights how it undervalues this "property."

Ill-advised custody and visitation decisions in family violence cases have an enormous potential to place children in physical and emotional jeopardy. Children are also exposed to emotional harm, however, when they are used as witnesses in the courtroom. Part III considers children as testimonial witnesses, examining how the legal system could adapt both its substantive law and its procedures to make the process of serving as a witness a less destructive one for children.

#### IV. CHILDREN AS WITNESSES: SAFEGUARDING CHILDREN WHO TESTIFY

My worst experience as a trial lawyer involved a five year old child who was forced to testify during a restraining order hearing. The child, who was living with her grandmother, told her grandmother that her father hit her during a visit. The grandmother filed for protection on behalf of the child and came to me for assistance. The child later repeated the story to me: when she asked her father for money for her school pictures, her father punched her in the stomach. She was absolutely clear about what had happened, and I was convinced that she was telling the truth.

Prior to the restraining order hearing, the child and I discussed what would happen in the courtroom: that she would have to talk to the judge, that she should tell the truth. She was very worried that her father would be in the courtroom, but we talked about how she could look at other people and how he couldn't harm her anymore. Once in court, we attempted to introduce the testimony of the child through the grandmother. The hearsay objection was sustained. Before her testimony, I asked the court to allow the child to testify *in camera*, out of the scrutiny of her father. Denied. I asked the court to modify the courtroom setting so that the child was not forced to sit on the witness stand, where her father could glare at her. Denied. And so the child took the witness stand. With the judge sitting above her and to her left on the bench, wearing his black robe, with her father sitting directly across from her, I began to ask her questions. I asked her about whether she understood what the truth was and whether she could tell the truth. I then took her through the day when her father punched her. Opposing counsel cross-examined the child, who never changed the substance of her story—that her father had punched her after she asked for money.

The judge, after hearing all of the evidence, ruled for the father. His ruling, he explained, was based almost completely on one factor: he didn't believe the child because she hadn't looked him in the eye during her testimony.<sup>294</sup> He found that the child could have been manipulated into saying that her father hit her. And when I went to get her at the day care center, where she'd gone after her testimony, her first question was whether her father was going to get her. Ultimately, he did:

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At the next hearing involving a child's testimony that I had before that judge, the child and I had staring contests so that she could practice looking adults in the eye. She did, and we prevailed.



he took her from the grandmother's home, where she had lived her entire life, and continued to emotionally and physically maltreat her.

That experience raised a number of questions about how children are treated when they serve as witnesses in court hearings. Children are more and more frequently called to court to testify to violence against them, to violence against a parent, and/or to the impact of the violence on them. This section considers whether children can be witnesses, whether they should be witnesses, and suggests ways that the legal system could change both substantive law and courtroom procedures in order to make the process of being a witness an easier one for children.

#### A. *Can Children Testify?*

"Judges and attorneys who question children in court often have apprehensions about young witnesses."<sup>295</sup> One commentator describes a preliminary hearing in a child sexual abuse case where, after considering all of the testimony, "the judge refused to bind the case over for trial and made the following statement: 'I'm not going to ruin the life of this fifty-year-old man on the testimony of a five-year old.'"<sup>296</sup> Although the legal system has long been skeptical about the utility of the testimony of child witnesses,<sup>297</sup> modern social science research refutes the characterization of children's testimony as unreliable. Research shows that children can testify effectively in court, are not "necessarily less reliable than adults,"<sup>298</sup> and, in fact, are more capable witnesses than most adults believe.<sup>299</sup> A child's ability to testify is certainly different than that of an adult, but "these differences should not obscure the fact that even very young children have demonstrated a remarkable ability to provide both relevant and reliable information to decision makers."<sup>300</sup>

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John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L. J. 3, 6 (1996) [hereinafter Myers et al., *Psychological Research*].

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Judge Donald J. Eyre, *The Child Witness: An Ever-Increasing Fact of Life in Utah Courts*, 11 UTAH B.J. 38, 38 (Feb. 1998). Judge Eyre was not the judge who made that statement.

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See LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 18-19 (1994).

<sup>298</sup>

Lucy Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 175 (1985).

<sup>299</sup>

See 2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 353 n.149 (1994) [hereinafter MYERS, EVIDENCE]. "Recent research indicates that children, by at least the age of four years, can be quite accurate in reporting the main actions witnessed or experienced in real life." *Id.* (quoting Goodman et al., *Determinants of the Child Victim's Perceived Credibility*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 1, 5 (S. Ceci, D. Ross & M. Toglia, eds. 1989)). Nonetheless, some cling to antiquated views about children's capacity: "The statements of a child under six years of age should not be taken too seriously, however." Gene H. Wood, *The Child as Witness*, FAM. ADVOCATE, Spring 1984, at 14, 18.

<sup>300</sup>

Myers et al., *Psychological Research*, *supra* note 295, at 10. See also STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 4 (1995) ("[A]lthough we think that there are data that highlight the potential weaknesses of children's reports, we do not think that these data are so consistent as to categorically discredit children from testifying or even to

## 1. Memory

Does a child have the capacity to observe an occurrence and remember it sufficiently to testify? Children develop the skills necessary to “witness” incrementally; age, therefore, is the dominant variable in considering the ability to witness.<sup>301</sup> Because children retain and retrieve more information as they get older, they are less able to access distant experiences than adults.<sup>302</sup> Developmental immaturity may make children less able to encode and retrieve information, two of the central memory processes.<sup>303</sup>

Despite these differences, research shows that children can recall experiences accurately and describe them effectively in court.<sup>304</sup> Very young children can accurately recall historical events, although they are not as proficient as adults at responding to open-ended questions calling for free recall.<sup>305</sup> As age decreases, children recall less information spontaneously and must be assisted in recalling what they know.<sup>306</sup> When cues and prompts are used to trigger retrieval, young children’s memory substantially improves.<sup>307</sup>

For “single stimulus tasks” like basic identification, children aged three have reliable memories, and children aged four and a half years old have skills almost comparable to adults.<sup>308</sup> Young children can recall basic temporal order, understand the actual frequency of events, and sort out actions involving several individuals.<sup>309</sup> Whether a child will notice and recall detail turns on the salience of the detail—the importance of the object or action to the child.<sup>310</sup> Like an adult

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recommend skepticism upon hearing a child’s disclosure.”).

<sup>301</sup> See MCGOUGH, *supra* note 297, at 23-24.

<sup>302</sup> See *id.* at 54.

<sup>303</sup> See Julie A. Dale, *Ensuring Reliable Testimony from Child Witnesses in Sexual Abuse Cases: Applying Social Science Evidence to a New Fact-Finding Method*, 57 ALB. L. REV. 187, 190 (1993). Younger children don’t take in as much information about events, and don’t always recognize that an event is significant enough to store in memory. Additionally, older children and adults use more complex retrieval strategies, which increases the amount of information that they can recall. In contrast, younger children are more dependent on context to trigger memories. Moreover, younger children have less ability to relate events; their narration tends to be “skeletal” and “loosely organized.” Myers et al., *Psychological Research*, *supra* note 295 at 9-10.

<sup>304</sup> See Berliner, *supra* note 298, at 171; CECI & BRUCK, *supra* note 300, at 235.

<sup>305</sup> See Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 955-56 (1993); Myers et al., *Psychological Research*, *supra* note 295, at 11.

<sup>306</sup> See MCGOUGH, *supra* note 297, at 65.

<sup>307</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 11. The problem with using cues and triggers, however, is that they can become suggestive and risk distorting the child’s memory. The problem of suggestibility is discussed *infra* at notes 326-340, and accompanying text.

<sup>308</sup> See MCGOUGH, *supra* note 297, at 26.

<sup>309</sup> See *id.* at 28-29.

<sup>310</sup> See *id.* at 25.

witness, a child encodes more detail when she realizes the importance of the event or is made aware of the importance by someone else's reaction to it.<sup>311</sup> Children's memory is especially resilient when recalling the central details or main action of events, personally significant events, and events in which the child directly participated.<sup>312</sup>

The passage of time has a significant impact on children's memory. Delay between the occurrence of an event and the relation of the event can cause memory distortion.<sup>313</sup> Children forget significantly more information than adults, and young children forget more than older children.<sup>314</sup> But while young children's memories may fade more quickly than adults, the child is likely to remember the salient features of the event.<sup>315</sup> And "[a]s long as the child is asked to use recognition or recall memory soon after the event to be remembered, reliability risks are minimal and no greater than for adult testimony."<sup>316</sup>

Children, like adults, do make mistakes in memory. Like adults, children are more likely to give an incorrect report about peripheral details.<sup>317</sup> Neither children nor adults retain peripheral detail well.<sup>318</sup> When children make errors in recollection, they are more often errors of omission (failure to include information) than errors of commission (including false or fabricated information).<sup>319</sup> Moreover, "there is nothing in the scientific literature that proves that if a child incorrectly remembers one aspect of an event, she will be incorrect about everything else as well."<sup>320</sup> Both children and adults use "stored memories," memories of previous events that fit into the event being recalled, to fill in gaps in an account.<sup>321</sup>

## 2. Conceptual Issues

Certain conceptual problems that affect testimony are unique to children because of their developmental immaturity. "[Y]oung children appear to be more

<sup>311</sup> See *id.* at 27.

<sup>312</sup> See Lisa Maushel, *The Child Witness and the Presumption of Authenticity After State v. Michaels*, 26 SETON HALL L. REV. 685, 751 (1996).

<sup>313</sup> See MCGOUGH, *supra* note 297, at 44.

<sup>314</sup> See *id.* at 61.

<sup>315</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 14.

<sup>316</sup> MCGOUGH, *supra* note 297, at 32.

<sup>317</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 33.

<sup>318</sup> See Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 189 (1985).

<sup>319</sup> See CECI & BRUCK, *supra* note 300, at 70. When asked open-ended questions, children may say little, and they are not always completely coherent, but they seldom provide wrong information. See Goodman & Helgeson, *supra* note 318, at 186.

<sup>320</sup> CECI & BRUCK, *supra* note 300, at 298.

<sup>321</sup> See MCGOUGH, *supra* note 297, at 37-38.

'data-bound,' more faithful to what they actually saw or heard or smelled and less prone to make assumptions about details that might have been present."<sup>322</sup> Children therefore may have difficulty with questions that require them to make abstract inferences.<sup>323</sup> Moreover, while children as young as four can provide reliable descriptive data about colors, identifying characteristics and basic object characterizations,<sup>324</sup> the ability to make time and distance categorizations is acquired at least four years later.<sup>325</sup>

The social science research supports the position that children have sufficient memory capacity to testify. The next question, then, is whether children are so susceptible to suggestibility that their testimony is worthless.

### 3. Suggestibility

Suggestibility, or the tendency to accept and incorporate false or misleading information into one's memory, has become one of the prime topics for social science researchers interested in children's memory. The research leans toward the conclusion that children are more suggestible than adults, although the question is still being debated within the scientific community.<sup>326</sup>

Research has shown that young children (under the age of five) are disproportionately more vulnerable to suggestibility than school-aged children or adults,<sup>327</sup> and are highly likely to accept misleading information in certain circumstances.<sup>328</sup> By the time children reach the ages of ten to twelve years, they are no more suggestible than adults.<sup>329</sup> Suggestibility should not, however, be seen as a memory failing peculiar to children. Adults' memories, too, can be influenced, changed, or distorted by suggestive factors.<sup>330</sup>

Suggestibility in children is overwhelmingly a result of the influence of adults' beliefs and interview techniques on children's memories. Erroneous suggestions put forth by adults, usually in the context of interviews or therapy, can overwrite the child's original memory.<sup>331</sup> "[C]hildren's inaccurate reports or

<sup>322</sup> *Id.* at 36.

<sup>323</sup> *See* Goodman & Helgeson, *supra* note 318, at 186.

<sup>324</sup> *See id.* at 30.

<sup>325</sup> Concepts of time and distance are acquired at the ages of eight to eleven years of age. *See* MCGOUGH, *supra* note 297, at 31. Concepts of historical time and sequencing are not developed until about ten years of age. *See* Dale, *supra* note 303, at 193.

<sup>326</sup> *See* Maushel, *supra* note 312, at 692-93.

<sup>327</sup> *See* CECI & BRUCK, *supra* note 300, at 233.

<sup>328</sup> *See* MCGOUGH, *supra* note 297, at 67.

<sup>329</sup> *See id.*; *see also* Myers et al., *Psychological Research*, *supra* note 295, at 27. Some researchers claim that children are as resilient as adults at the age of seven years. *See* MCGOUGH, *supra* note 297, at 67.

<sup>330</sup> *See* CECI & BRUCK, *supra* note 300, at 238.

<sup>331</sup> *See* Montoya, *supra* note 305, at 936.

allegations do not always reflect a confusion of events and details of an experience, but may at times reflect the creation of an entire experience in which the child did not participate.<sup>332</sup> Misinformation repeated across interviews is incorporated into the child's memory both directly (children repeat the same language that they heard) and indirectly (children draw inferences based on the misinformation).<sup>333</sup> When children are repeatedly asked to create mental images of fictitious events, over time they will increasingly begin to believe that the events have occurred and may be reluctant to relinquish that belief.<sup>334</sup>

The manner in which a child is questioned is the key to whether the child's memory will be tainted by suggestibility. The accuracy of a child's report decreases when the child is interviewed in leading or suggestive ways by investigators who are not open to considering theories other than those they seek to support through the interview.<sup>335</sup> If the initial interview of the child is neutral, it helps to protect the child's memory against later suggestive interviews.<sup>336</sup>

Young children are not invariably suggestible.<sup>337</sup> Children are much less likely to be misled about central information than they are about peripheral detail.<sup>338</sup> It is harder to mislead children when the events are fresh than when their memories have faded.<sup>339</sup> And some children are unwilling to accept suggestion at all. "[T]hese children's resistance is an indication of how difficult it sometimes is to use suggestive techniques to capture and change the memories and reports of some young children who steadfastly refuse to relinquish their accurate memories."<sup>340</sup>

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<sup>332</sup> CECI & BRUCK, *supra* note 300, at 133.

<sup>333</sup> *See id.* at 109.

<sup>334</sup> *See id.* at 219-22. Adults are similarly suggestible; they, too, will internalize fictitious events and are reluctant to relinquish what they believe to be true memories. *See id.* at 226.

<sup>335</sup> *See id.* at 85. This phenomenon is known as "interviewer bias." *See* CECI & BRUCK, *supra* note 300, at 79-80. When the interviewer's hypothesis is correct, the child's recall is highly accurate and there are few errors of omission or commission. When the interviewer pursues an incorrect hypothesis, however, a substantial amount of inaccurate information is likely to be generated, especially from the youngest preschoolers. *See id.* at 90.

<sup>336</sup> *See id.* at 111. It is important to note that not all "leading" questions are harmfully suggestive. Rather, there is a continuum of suggestiveness, ranging from open-ended questions, which are not suggestive, through focused and specific questions, to the type of leading questions that may distort memory. *See* Myers et al., *Psychological Research*, *supra* note 295, at 15.

<sup>337</sup> *See* Myers et al., *Psychological Research*, *supra* note 295, at 28.

<sup>338</sup> *See* Goodman & Helgeson, *supra* note 318, at 188; MCGOUGH, *supra* note 297, at 67-68.

<sup>339</sup> *See* CECI & BRUCK, *supra* note 300, at 110.

<sup>340</sup> *Id.* at 298.

## 4. Lies

By the age of four, children can distinguish between reality and fantasy.<sup>341</sup> At least as early as age six, children can lie,<sup>342</sup> and do lie when the motivation to lie is strong enough.<sup>343</sup> Motivations to lie include avoiding punishment, gaining an otherwise unattainable material benefit, protecting themselves or others from harm, protecting friends from trouble, winning the admiration of others, avoiding awkward social situations, avoiding embarrassment, maintaining privacy, demonstrating authority, sustaining a game, or keeping a promise.<sup>344</sup>

But there is a difference between lying and making mistakes. Young children are commonly inconsistent across several interviews: "What looks like inconsistency may actually be a product of the child's comfort with the interviewer, the interviewer's developmental insensitivity, or the child's ability to retrieve relevant information at a given moment in time."<sup>345</sup> In the absence of suggestive influences, children's inconsistency should not be equated with unreliability or untruthfulness, as children regularly provide and omit detail over time.<sup>346</sup> Similarly, as noted above, children have difficulty with time and measurement; problems with misordering the sequences of events or dates do not mean that the child is fabricating central facts.<sup>347</sup> And occasionally children (like adults) simply give bizarre answers—without leading questions or motivations to distort the facts.<sup>348</sup>

How can we determine when a child's testimony is truthful? While there is no definitive answer, some factors are telling. A child witness' testimony is likely to be accurate when it conveys the central information about an event; when the event was relatively extended over time, allowing ample opportunity for observation; when the assailant is familiar to the child; when the event has been repeated; and when no highly suggestive questioning of the child has occurred.<sup>349</sup> Stories that include unexpected complications, unusual details and superfluous

<sup>341</sup> Although the line may blur when the fantasy causes fear (i.e., the monster under the bed). See MCGOUGH, *supra* note 297, at 40.

<sup>342</sup> Six is the conservative estimate; other research suggests that pre-school children can lie. *Id.* at 85.

<sup>343</sup> See *id.*; see also CECI & BRUCK, *supra* note 300, at 262.

<sup>344</sup> See CECI & BRUCK, *supra* note 300, at 40; MCGOUGH, *supra* note 297, at 40.

<sup>345</sup> Myers et al., *Psychological Research*, *supra* note 295, at 20.

<sup>346</sup> See CECI & BRUCK, *supra* note 300, at 235.

<sup>347</sup> See Goodman & Helgeson, *supra* note 318, at 190.

<sup>348</sup> See CECI & BRUCK, *supra* note 300, at 235.

<sup>349</sup> See Goodman & Helgeson, *supra* note 318, at 185. There is a substantial body of thought about how to ensure that interviews of child victims/witnesses are not suggestive, largely in the context of child sexual abuse cases. See, e.g., Dale, *supra* note 303; Diana B. Lathi, *Sex Abuse, Accusations of Lies and Videotaped Testimony: A Proposal for a Federal Hearsay Exception in Child Sexual Abuse Cases*, 68 U. COLO. L. REV. 507 (1997); MCGOUGH, *supra* note 297; Montoya, *supra* note 305.

details are probably being recalled from memory.<sup>350</sup> Also, a child who makes spontaneous corrections or additions to her story is probably recalling an actual event, as is a child who is willing to admit that she has forgotten elements of the story.<sup>351</sup> Ultimately, the responsibility is with the trier of fact to ensure that a child who testifies understands her obligation to tell the truth.<sup>352</sup>

The social science research indicates that although they have certain deficiencies, children can serve as witnesses to events and provide probative information. The next section asks whether children should serve as witnesses in our current adversarial system, and looks for alternatives permitting the inclusion of the testimony of children who should not.

## B. *Should Children Have to Serve as Witnesses?*

### 1. Emotional and Psychological Factors

The answer to the question posed in this section is no, according to Dr. Albert J. Solnit, former director of the Yale Child Study Center. Dr. Solnit has suggested that children be kept out of courtrooms altogether—that it is never in a child's best interest to be a witness.<sup>353</sup> Few other experts take quite so decisive a stance. Some believe that testifying can be beneficial for children; “[f]or many children, testifying in court often helps them to feel empowered and to heal.”<sup>354</sup> Some children want to share their experiences, to describe the impact of the violence and their fears, risks they perceive and their preferences on custody.<sup>355</sup> Especially in cases where the parents cannot afford expert witnesses or the child is not represented, the judge will have no other means of hearing “the testimony of

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<sup>350</sup> See Dale, *supra* note 303, at 201.

<sup>351</sup> See *id.* at 203.

<sup>352</sup> “As a safeguard against the possibility that the child witness may not have internalized the importance of truthful testimony . . . the court should seize the opportunity to give some minimal instruction about that duty and about the serious consequences that could result from giving untrue testimony in a court of law.” MCGOUGH, *supra* note 297, at 115-16.

Professors Thomas D. Lyon and Karen Saywitz have developed a new test to determine a child's ability to distinguish fact from truth. The child is shown two sets of pictures, one depicting a child telling the truth, the other depicting a child lying. The child witness is asked which in the pair is telling the truth and which is lying. Lyon and Saywitz found that the picture test is a much better means of determining whether a child knows the difference between the truth and lies than the traditional method of asking the child questions about truth and lies. See John Gibeaut, *Picture of Competency*, ABA J., April 2000, at 24.

<sup>353</sup> See MCGOUGH, *supra* note 297, at 4.

<sup>354</sup> United States Department of Justice, Office of the United States Attorney, District of Columbia, Victim Witness Assistance Unit, CHILDREN IN COURT: A HANDBOOK FOR PARENTS AND GUARDIANS OF CHILD VICTIMS/WITNESSES WHO HAVE TO TESTIFY IN COURT 1 (on file with the author) (hereinafter CHILDREN IN COURT). See also Myers et al., *Psychological Research*, *supra* note 295, at 75-76 (“The overriding theme of the research, however, is that children are strong and resilient. They bounce back.”).

<sup>355</sup> See NANCY K.D. LEMON & PETER JAFFE, DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES 82 (1995).

those who may be most affected by the family court decisions.”<sup>356</sup> Children who are not permitted to participate in the legal process may become angry; “[s]uch anger causes the child more stress than if he or she had testified in court.”<sup>357</sup> Moreover, testifying may help children recover from the psychological trauma of the underlying events. At least one study shows that children who testified in juvenile court resolved their psychological trauma more quickly than children who did not testify.<sup>358</sup>

Nonetheless, testifying can be incredibly stressful for some children.<sup>359</sup> The way that the child reacts to testifying depends on the child’s personality and ability to handle new and stressful situations, the severity of the underlying event, and how the child was affected by the event.<sup>360</sup> The courtroom setting in and of itself can be stressful. Children have little idea of what to expect from court;<sup>361</sup> what little they do know comes from the media and television and often causes “intense fear and anxiety.”<sup>362</sup> They believe that they could go to jail for giving a wrong answer or that the defendant will be permitted to “get” them or yell at them.<sup>363</sup> Added to those fears are the pressures of speaking in front of an audience, being cross-examined, and being separated from a support person.<sup>364</sup> Simply being

<sup>356</sup> William D. Slicker, *Child Testimony*, 72 FLA. B.J., Nov. 1998, at 46.

<sup>357</sup> *Id.*

<sup>358</sup> See MYERS, EVIDENCE, *supra* note 299, at 345-46 (citing Runyan et al., *Impact of Legal Intervention on Sexually Abused Children*, 113 J. PEDIATRICS 647 (1988)). But see *id.* at 346 (citing study by Goodman et al., *The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims* (1993), which showed that all children, regardless of whether they testified, improved over time, and that the more times a child had to testify, the slower the improvement).

<sup>359</sup> See Goodman & Helgeson, *supra* note 318, at 83. Testifying may be stressful for some children, but not necessarily all children. *Id.*; see also Claudia L. Marchese, *Child Victims of Sexual Abuse: Balancing a Child’s Trauma Against the Defendant’s Confrontation Rights—Coy v. Iowa*, 6 J. CONTEMP. HEALTH L. & POL’Y. 411, 415 (1990). Some judges have a blanket policy against letting children testify because they believe the experience is too stressful for the child. Slicker, *supra* note 356, at 46.

Most of the literature on child witnesses focuses on children testifying in child sexual abuse cases. Nonetheless, this information is relevant to children who testify in family violence cases. “[T]here is no reason to limit our concern for child witnesses . . . to cases of child sexual abuse. Children are socially, cognitively and developmentally children irrespective of the charges,” or of whether the case is a civil or criminal one. Montoya, *supra* note 305, at 939. Moreover, child sexual abuse cases and family violence cases are similar in some important ways. Both usually involve abuse by a close friend or family member; both cause similar psychological harm, as discussed in Part I, *supra*; and the child is often the only witness to the incident in both types of cases.

<sup>360</sup> See CHILDREN IN COURT, *supra* note 354, at 1.

<sup>361</sup> This research will be discussed more thoroughly in Section IV.C.1, *infra*, which focuses on the issue of education and preparation of child witnesses.

<sup>362</sup> United States Department of Justice, Office of Justice Programs, Office for Victims of Crime, *New Directions from the Field: Victims’ Rights and Services for the 21<sup>st</sup> Century* (found 7/11/99) <<http://www.ojp.usdoj.gov/ovc/new/directions/chap17.htm>> (hereinafter *New Directions*).

<sup>363</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 59, 69-70.

<sup>364</sup> See Goodman & Helgeson, *supra* note 318, at 201; Myers et al., *Psychological Research*, *supra* note 295, at 69-70.



in the same room as the defendant can be incredibly traumatic.<sup>365</sup> The atmosphere of the courtroom can be “threatening,” “frightening,” or “confusing” for children.<sup>366</sup> Questioning a child in an intimidating environment like a courtroom can increase a child’s stress;<sup>367</sup> it can also undermine the quality of the information obtained.<sup>368</sup> While the effects of stress on memory and the reliability of child witnesses are still unclear,<sup>369</sup> researchers have posited that stress can prompt memory retrieval problems, can make children more-suggestible, and can cause them to become more easily confused, leading to a loss of confidence in their testimony.<sup>370</sup>

“Testifying is difficult for most children, and it is not surprising when young witnesses respond in childlike ways,” including whispering, crying and refusing to speak.<sup>371</sup> Some children simply cannot testify in open court. Case law describes children who:

—were rendered inarticulate by intimidating court surroundings;<sup>372</sup>

—were frightened by the jury, the defendant and the court setting, unable to answer any but neutral questions, and left the court clutching the mother and crying hysterically;<sup>373</sup>

—suffered from guilt, fear and anxiety, and faced potential long-term problems including nightmares, depression, eating, sleeping, and school problems, and behavioral difficulties, including acting out.<sup>374</sup>

Children who do testify may perform poorly, undermining their credibility. A traumatized child may refuse or be physically unable to testify in front of the defendant.<sup>375</sup> A young child coping with the anxiety of testifying might avoid questions or fail to fully disclose, especially when they’ve been told not to tell

<sup>365</sup> See Goodman & Helgeson, *supra* note 318, at 201; MYERS, EVIDENCE, *supra* note 299, at 345. Intimidation can also interfere with the accuracy of the child’s report. Goodman & Helgeson, *supra* note 318, at 190.

<sup>366</sup> American Academy of Child & Adolescent Psychiatry, *Policy Statement: Protecting Children Undergoing Abuse: Investigation and Testimony*, (visited 6/3/99) <<http://www.aacap.org/publications/policy/ps17.htm>> (hereinafter *Policy Statement*).

<sup>367</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 23.

<sup>368</sup> Studies show that children give more complete and accurate information when questioned in an informal, non-adversarial setting. See Montoya, *supra* note 305, at 964 n.322.

<sup>369</sup> See MCGOUGH, *supra* note 297, at 48-50.

<sup>370</sup> See Goodman & Helgeson, *supra* note 318, at 203-04. Myers, Saywitz & Goodman contend that the core features of an event are retained even under stress, although the peripheral details may or may not be remembered. See Myers et al., *Psychological Research*, *supra* note 295, at 24. See also Marchese, *supra* note 359, at 418-19 (arguing that stress enhances problems that already exist for child witnesses).

<sup>371</sup> MYERS, EVIDENCE, *supra* note 299, at 323.

<sup>372</sup> See *In Re Dirk S.*, 14 Cal App. 4<sup>th</sup> 1037, 1039-40 (1993).

<sup>373</sup> See *People v. Algarin*, 498 N.Y.S.2d 977, 979 (1986).

<sup>374</sup> See *Commonwealth v. Ludwig*, 484 A.2d 1330, 1332 (N.J. 1984).

<sup>375</sup> See Karen L. Tomlinson, *Maryland v. Craig: Televised Testimony and an Evolving Concept of Confrontation*, 36 VILL. L. REV. 1569, 1592 (1991).

anyone about the event.<sup>376</sup> The child's reticence may lead judges to discredit a "frozen, inarticulate child,"<sup>377</sup> damaging the child's confidence. Moreover, children who are grappling with psychiatric issues like attentional deficits, psychic numbing, social withdrawal, and feelings of hopelessness, self-hatred or helplessness "can appear to be highly reluctant, uncooperative witnesses who provide little information."<sup>378</sup>

## 2. The Adversarial Legal System

The adversarial legal system is not well-equipped to accommodate child witnesses. "[F]or some children, testifying in the traditional manner interferes with the child's ability to answer questions, thus undermining the very purpose of the trial—discovery of the truth."<sup>379</sup> For a number of reasons, the time-honored methods of direct and cross examination are not the best means of gleaning the truth from child witnesses.<sup>380</sup> As discussed above, children do not always give complete information when asked the type of free-recall, open-ended questions that are common during direct examination.<sup>381</sup> Moreover, children are "emotionally and linguistically ill-equipped for the rigors of cross-examination and are easily confused."<sup>382</sup> During cross examination, attorneys confuse children by using double negatives, difficult sentence constructions and complicated words.<sup>383</sup> The accusatory manner of cross examination can be intimidating for the child.<sup>384</sup> Because children have difficulty remembering peripheral events and the sequence of events, questions about those details can undermine the child's confidence and render her testimony less effective.<sup>385</sup>

Additionally, "[s]uggestibility theory itself suggests that a lawyer may be able to lead a child witness to statements advantageous to the defendant."<sup>386</sup>

<sup>376</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 49; Tomlinson, *supra* note 375, at 1604.

<sup>377</sup> MCGOUGH, *supra* note 297, at 121.

<sup>378</sup> Myers et al., *Psychological Research*, *supra* note 295, at 41.

<sup>379</sup> Eyre, *supra* note 296, at 41 (citing GAIL GOODMAN, ET AL., TESTIFYING IN CRIMINAL COURT, Monographs of the Society for Research in Child Development 151).

<sup>380</sup> See Goodman & Helgeson, *supra* note 318, at 204.

<sup>381</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 11-12. It may take repeated interviews involving these types of questions to obtain complete information, a luxury not available during direct examination.

<sup>382</sup> Montoya, *supra* note 305, at 954.

<sup>383</sup> See Goodman & Helgeson, *supra* note 318, at 202.

<sup>384</sup> See *id.*

<sup>385</sup> See *id.* Ways of addressing the problems presented by cross-examination for children who do testify are discussed at Part III.C.3.a., *infra*.

<sup>386</sup> Maushel, *supra* note 312, at 742.

Children are, as discussed above, susceptible to suggestion through leading questions. Moreover, children are motivated by a desire to please adults, and may tailor their answers to reflect what they believe the adult wants to hear, even if that answer is inconsistent with their own knowledge of the event.<sup>387</sup> "In fact, children are so accommodating of adult questioning that they will struggle against all odds to bring order out of confusion, to make sense of questions, and to provide answers to adults' seriously stated inquiries."<sup>388</sup> Finally, children, when asked the same question more than once, often change their answers, assuming that because they have been asked again, the original answer must have been incorrect.<sup>389</sup> Children are especially likely to change their answers to specific or leading questions<sup>390</sup>—precisely the type of situation that a lawyer conducting cross-examination is likely to exploit. The combination of susceptibility to suggestion, confusion about language, desire to please adults and tendency to change answers makes children singularly unsuited to undergo cross-examination. "In sum, many factors point to the conclusion that, if the goal is to determine the truth, the adversary process may not be the best means of obtaining the truth from children."<sup>391</sup>

### 3. Intrafamily Cases

Testifying in a case involving family violence presents unique problems for the child witness; while he may be the only eyewitness to the violence, "the child may suffer great trauma from testifying."<sup>392</sup> The stakes for children and families are particularly high in family violence cases. "Intrafamily offenses are especially problematic because even young children can foresee the havoc truthfulness can invite."<sup>393</sup> Child victims and witnesses often feel responsible for the abuser's actions, especially when a family member is committing the abusive acts.<sup>394</sup> Children are pressured by their parents to testify/not to testify, fear physical

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<sup>387</sup> See CECI & BRUCK, *supra* note 300, at 78. Because of their confidence and trust in adults, children are likely to accept misinformation given or implied by an adult even when it conflicts with their own knowledge. MCGOUGH, *supra* note 297, at 72. Children are also susceptible to coaching by the adults that they trust, and will lie if asked to by trusted adults, especially parents. "When the misdeed is committed by the parent and the parent coaches the child to lie about it, most children will accept the coaching and tell the lie to protect the parent." *Id.* at 92.

<sup>388</sup> MCGOUGH, *supra* note 297, at 72.

<sup>389</sup> See CECI & BRUCK, *supra* note 300, at 79, 119.

<sup>390</sup> See *id.* at 119-20.

<sup>391</sup> Goodman & Helgeson, *supra* note 318, at 204.

<sup>392</sup> Family Violence Project, *Domestic Violence: Benchguide for Criminal Courts*, 10 CJER JOURNAL 93, 131 (Summer 1990).

<sup>393</sup> MCGOUGH, *supra* note 297, at 87 (describing a seven year old who refused to testify in an intrafamily proceeding because he believed that as a result of his testimony, Daddy would go to jail and Mommy would be mad.)

<sup>394</sup> See CHILDREN IN COURT, *supra* note 345, at 9. While *Children in Court* discusses the ramifications for child abuse victims, the point is no less salient for children who witness domestic violence.

retribution if they do testify, and often don't want to take sides.<sup>395</sup> Children become "informational pawns, caught between two beloved parents and facing catastrophic loss no matter how they choose" to testify.<sup>396</sup>

Testifying about family violence, especially where custody determinations are involved, requires the child to divide his loyalties and potentially to make derogatory statements about a parent with whom the child wants a long-term relationship.<sup>397</sup> For the reasons discussed in Part I, *supra*, children may side with the abusive spouse and request that they be placed in the custody of the abuser. "[O]utright fear" can "determine a child's testimony."<sup>398</sup>

To alleviate the pressure on children to testify in domestic relations proceedings, some states have begun to restrict the ability of parties in these matters to call children as witnesses. Florida Family Law Rule of Procedure 12.407 states that a minor child cannot serve as a witness without the permission of the court, granted on good cause shown, except in emergency proceedings.<sup>399</sup> Prior to the inception of the Rule, "parents were bringing children to meet with [attorneys] to tell various things that would be 'helpful' to our cases and . . . the parents wanted the kids to testify to these events and to their desires as to parenting in court."<sup>400</sup> The Rule was designed to limit children's involvement to cases of absolute necessity and to create disincentives to parents manipulating or burdening the child.<sup>401</sup> The Rule does not take the position that children should never come to court or that child testimony is "inherently unreliable;" it simply seeks to dissuade parents from manipulating their children and to control the manner in which the testimony will occur if such testimony is deemed necessary.<sup>402</sup> Requiring advance notice that a child will testify allows the court to adjust courtroom procedure to protect the child's best interest—by appointing a *guardian ad litem*, requiring that the child be brought to court by a neutral third party, setting limits on the nature, manner and extent of questioning, and deciding whether the parents should be present during the testimony.<sup>403</sup>

<sup>395</sup> See LEMON & JAFFE, *supra* note 355, at 83. Moreover, other family members may castigate children for "taking sides." Family Violence Project, *supra* note 383, at 131.

<sup>396</sup> MCGOUGH, *supra* note 297, at 82.

<sup>397</sup> See Beth Longo, *Testimony of Children in Custody Battles*, W. VA. LAW., Mar. 1996, at 18; Wood, *supra* note 290, at 15.

<sup>398</sup> Longo, *supra* note 397, at 19.

<sup>399</sup> FLA. FAM. L.R.P.12.407. One possible "emergency" is where the child is the only witness in an emergency domestic violence hearing. Deborah Marks, *Defending the 'Child Witness' Rule*, 72 FLA. B.J., Nov. 1998, at 49. See also W.VA. FAM. L.R. 16 (requiring party to obtain permission of court before child witness permitted to testify).

<sup>400</sup> Marks, *supra* note 399, at 49.

<sup>401</sup> See *id.* at 49-50.

<sup>402</sup> See *id.* at 50.

<sup>403</sup> See *id.* But see generally Slicker, *supra* note 356 (arguing that children want input, that the law requires consideration of the child's wishes and that the social science literature supports the inclusion of

California's Family Code incorporates a similar provision. California Family Code § 3042 allows the court to "preclude the calling of the child as a witness where the best interests of the child so dictates. . . ."<sup>404</sup> Section 3042 is designed to protect children from the emotional damage of testifying by preventing a child from being called as a witness where the value of the testimony is outweighed by the potential emotional damage to the child.<sup>405</sup> Like the Florida rule, the California statute does not prevent the child from testifying when the child expresses a desire to testify, but seeks to protect children from the emotionally damaging consequences of forced testimony.<sup>406</sup>

Although children have the capacity to serve as witnesses, not all children are emotionally or cognitively prepared to testify in family violence cases. Provisions such as those in place in Florida and California remove the decision from the hands of the interested parties, who may have motives for urging the child witness to testify entirely separate from concerns about the well-being of the child,<sup>407</sup> and put them in the hands of neutral finders of fact. If properly enforced by judicial officers,<sup>408</sup> such provisions could protect children who are not equipped to testify without enacting a blanket proscription against children's testimony.

Another means of allowing the child to be heard without causing undue harm to the child is through out-of-court statements made to another party. The next section will discuss how the creative use of hearsay exceptions can ensure that the child is heard in court without the collateral damage of testifying.

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child witness testimony). On the issue of the stress caused by testifying, Slicker asks, "[A]re we to cancel school testing and dentist appointments for children because they cause stress?" *Id.* at 48. *See also* Berliner, *supra* note 298, at 174 ("There is no reliable evidence to conclude that children in general cannot testify effectively in court or that they are universally traumatized by the experience. In fact the opposite seems to be true . . . . It is therefore possible that a movement to keep children out of the courtrooms could serve to perpetuate the incorrect perception of children as incompetent witnesses.").

<sup>404</sup> CAL. FAM. CODE § 3042(b) (West 1999).

<sup>405</sup> *See* Sean P. Lafferty, *Family; Child Custody--Examination of Child Witnesses in Court Proceedings*, 26 PAC. L.J. 565, 566 (1994).

<sup>406</sup> In fact, the child witness exclusion provision is part of a statute requiring that the court "consider and give due weight to the wishes of" a child "of sufficient age and capacity to reason so as to form an intelligent preference as to custody." CAL FAM. CODE ANN. § 3042(a) (West 1999).

<sup>407</sup> In one custody proceeding in which I participated, the father, who had been abusive towards his wife, swore to the judge that if permitted to testify, their five year-old child would say that the mother had abused the children. The charge was completely unfounded, and the judge wisely recognized that the father's absolute certainty about what the child would say arose largely from the constant pressure he had put on the child to testify falsely against her mother. The judge refused to allow the child to testify, but did not have the protection of the type of statute described above to support her decision.

<sup>408</sup> As in the case of the custody and visitation statutes described in Part II, *supra*, meaningful protection depends on the willingness of judicial officers to enforce these provisions.

C. *Alternatives to In-Court Testimony*<sup>409</sup>

Often a child's experience or opinion will be relevant, and even probative, in deciding cases involving family violence. But when testifying is too difficult for the child, that perspective is often lost. This section will discuss introducing child hearsay statements and will propose modifications to and new applications for the child hearsay exclusions becoming common in child sexual abuse cases.

1. Use of Current Hearsay Exceptions

Hearsay evidence is "evidence of a statement made outside of the proceedings in which it is being offered to prove the truth of the matter asserted in the statement."<sup>410</sup> Such evidence is generally inadmissible, but hearsay statements may be admitted under a number of exceptions to the hearsay rule when both the trustworthiness of and the necessity for the statement can be established.<sup>411</sup> The hearsay exceptions permit the court to consider the out-of-court declarations "of any witness, including a child."<sup>412</sup>

Social scientists have determined that "lacking empirical data that children's volunteered out-of-court statements are inherently less reliable than adults, we may safely continue the traditions of more than three hundred years of the hearsay rule development."<sup>413</sup> Similarly, some courts have found that the hearsay rules and exceptions properly cover children's declarations, in part to protect children from the harm of testifying.

Historical analyses of the arcane judicial rules concerning hearsay and competency that have developed over the centuries in cases involving adults, whether civil or criminal in nature, are of little assistance in proceedings designed only to determine how to best safeguard the welfare of children of extremely tender years. Such children may be totally incapable of treating with the abstractions that underlie testimonial competency, yet are quite capable of observing and reporting on specific events to which they are

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<sup>409</sup> This article focuses on civil family violence proceedings, including restraining orders, divorce, custody, and visitation cases involving issues of family violence. There is a wealth of literature on alternate forms of child testimony in criminal cases; this article does not attempt to address the issues discussed in that literature, including Sixth Amendment Confrontation Clause rights, closed circuit television and videotaped testimony.

<sup>410</sup> PAUL RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 4.01, at 215 (1996).

<sup>411</sup> See Judy Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1747-48 (1983). In considering whether a statement is both trustworthy and necessary, four questions should be considered: First, is the statement itself ambiguous? Second, is the declarant truthful? Third, does the declarant clearly remember the statement? Fourth, has the declarant misunderstood the statement's meaning? *Id.*

<sup>412</sup> MCGOUGH, *supra* note 297, at 131.

<sup>413</sup> *Id.* at 143-44.

privy.<sup>414</sup>

Hearsay statements are objectionable largely because they cannot be tested through cross-examination,<sup>415</sup> deemed "the greatest legal engine ever invented for the discovery of truth."<sup>416</sup> But this adage may not hold true in cases involving children's testimony.<sup>417</sup> In fact, a child's out-of-court statement may be more reliable than her in-court testimony.<sup>418</sup> The reliability of the child's statement may be enhanced because it is spontaneous and unrehearsed,<sup>419</sup> because it is not the product of extended questioning, and because it is free of the stress caused by the courtroom setting.<sup>420</sup> Moreover, certain hearsay statements avoid the problem of memory fade. "Testimonial memory-fade, which is a greater risk for children than adults, is certainly less of a problem when hearsay statements are offered that were made closer in time to the child's experience."<sup>421</sup> Hearsay testimony is crucial in cases where, although the child has the cognitive ability to do so, she simply cannot testify or her testimony is ineffective.<sup>422</sup>

A number of hearsay exceptions are commonly used to admit the statements of child witnesses. They include the exceptions for excited utterances or spontaneous exclamations; statements for the purpose of medical diagnosis or treatment; statements of existing mental, emotional or physical condition; and the residual hearsay exception.

#### a. Excited Utterances/Spontaneous Exclamations

The excited utterance exception applies to a statement made as a result of a shocking or exciting event, if the event is still affecting the child at the time the statement is made and the statement is made during or immediately following the

<sup>414</sup> See *In Re Carmen O.*, 28 Cal. App. 4<sup>th</sup> 908, 920 (1994) (quoting *In Re Kailee B.*, 18 Cal. App. 4<sup>th</sup> 719 (1993)).

<sup>415</sup> "The rule against admission of hearsay statements stems from the long-established belief that cross-examination is the best vehicle for discovering the truth and that the most reliable statements come from the witness stand." Yun, *supra* note 411, at 1747.

<sup>416</sup> *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore 1367).

<sup>417</sup> See Part III.B.2., *supra*.

<sup>418</sup> See Yun, *supra* note 411, at 1751.

<sup>419</sup> See Josephine A. Bulkley, *Recent Supreme Court Decisions Ease Child Abuse Protections: Use of Closed-Circuit Television and Children's Statements of Abuse Under the Confrontation Clause*, 16 NOVA L. REV. 687, 689 (1992).

<sup>420</sup> See Yun, *supra* note 411, at 1751-52.

<sup>421</sup> MCGOUGH, *supra* note 297, at 154.

<sup>422</sup> See Lathi, *supra* note 349, at 510-12; MYERS, EVIDENCE, *supra* note 299, at 81. Courts have recognized the need for inclusion of hearsay to counteract a child's inability to testify or inadequate testimony. "[C]ommon sense suggests that in many cases the most probative evidence of the child's opinion may lie in statements the child has made to others . . . rather than in testimony given in the formal surroundings of a court proceeding." *In Re T.W.*, 623 A.2d 116, 117 (D.C. 1993).

event, before there is time for reflection.<sup>423</sup> Advocates for children should take special note of statements made to police, hospital staff, teachers, doctors and day care workers,<sup>424</sup> all of whom may interact with the child near the time of an incident of family violence.

Courts differ as to how close in time the statement must be to the exciting event to be admissible. Some courts allow statements made after days or weeks; others disallow statements made only a few minutes or hours after the exciting event.<sup>425</sup> Statements made at the "first safe opportunity" or during a period of "rekindled excitement" may be admissible despite the passage of time.<sup>426</sup> Such statements may be admitted after significant time has passed because courts recognize that a child witness may not have immediate access to the person he will tell about the frightening event.<sup>427</sup> But the willingness to allow for the passage of time has prompted some critics to argue that courts have "distorted the hearsay rule."<sup>428</sup>

#### b. Statements for the Purpose of Medical Diagnosis or Treatment

Statements made to medical professionals for the purpose of diagnosing or treating an ailment are also admissible as an exception to the hearsay rule. Statements for the purpose of diagnosis or treatment are admitted under two rationales. First, the patient's interest in receiving appropriate medical care suggests that patients will give reliable information to their doctors. Second, the exception allows only for the admission of statements that would be reasonably relied upon by doctors, based on the assumption that doctors can separate accurate from inaccurate information.<sup>429</sup> States vary on the question of whether statements to mental health professionals are admissible under this exception.<sup>430</sup>

Commentators have suggested that children's statements to physicians are not sufficiently reliable to be admitted under this exception. They argue that children do not understand the importance of reporting accurate information and therefore do not have the same sense of self-interest in conversations with

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<sup>423</sup> See Yun, *supra* note 411, at 1753-55.

<sup>424</sup> See LEMON & JAFFE, *supra* note 355, at 83. Excited utterances and present sense impressions may also be found in 911 tapes and police records. *Id.*

<sup>425</sup> See Bulkley, *supra* note 419, at 690.

<sup>426</sup> MYERS, EVIDENCE, *supra* note 299, at 170-71.

<sup>427</sup> See MCGOUGH, *supra* note 297, at 134. Time delays may also be triggered by fear, confusion, guilt, efforts to forget, or threats by the perpetrator. Yun, *supra* note 411, at 1576-78.

<sup>428</sup> Krista MacNevin Jee, *Hearsay Exceptions in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?*, 19 WHITTIER L. REV. 559, 574 (1998).

<sup>429</sup> See MYERS, EVIDENCE, *supra* note 299, at 218.

<sup>430</sup> See Bulkley, *supra* note 419, at 691; Jee, *supra* note 428, at 570-71.



doctors.<sup>431</sup> They may try to evade the doctor's questions, believing that doctors are "being mean" when they provide treatment.<sup>432</sup> But doctors who regularly treat children, including pediatricians, child psychiatrists and child psychologists, are trained to explain the importance of accurate reporting, especially when a child is withdrawn or frightened.<sup>433</sup>

c. Then Existing State of Mind/Emotion/Sensation/Physical Condition

A statement that is otherwise hearsay is admissible for the truth of the matter asserted when it describes the existing state of mind, emotion, sensation or physical condition experienced at the time the statement was made.<sup>434</sup> The child's state of mind is uniquely relevant in family violence cases, where the impact of the violence on the child and the ramifications for custody and visitation determinations are being considered. "In child custody and visitation litigation. . . the child's feelings, fears, likes, and dislikes are central to the child's best interest. The child's state of mind is in issue in such litigation, and the child's hearsay statements revealing the state of mind are admissible."<sup>435</sup> The most probative evidence of the child's opinion may lie in statements to others rather than in the child's testimony in open court.<sup>436</sup> Such statements may also be admissible for non-hearsay purposes; for example, a child's statement about violence perpetrated by the father might be admitted not to prove that the violence occurred, but rather to show the child's fear of the father.<sup>437</sup>

d. Residual Exception

Some states and the Federal Rules of Evidence have adopted a residual hearsay exception. The exception permits the admission of statements that do not satisfy the requirements of traditional hearsay exceptions but nonetheless have

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<sup>431</sup> See Jee, *supra* note 428, at 568; see generally, John J. Capowski, *An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 GA. L. REV. 353 (1999); MCGOUGH, *supra* note 297, at 142; MYERS, EVIDENCE, *supra* note 299, at 220-21.

<sup>432</sup> MYERS, EVIDENCE, *supra* note 299, at 220-21; Capowski, *supra* note 431, at 405-06.

<sup>433</sup> See MCGOUGH, *supra* note 297, at 142.

<sup>434</sup> See MYERS, EVIDENCE, *supra* note 299, at 199-200.

<sup>435</sup> *Id.* at 205.

<sup>436</sup> See, e.g., *In Re I.B.*, 631 A.2d 1225, 1232 (D.C. 1998) (citing *In Re T.W.*, 623 A.2d 118 (D.C. 1993).

<sup>437</sup> See MYERS, EVIDENCE, *supra* note 299, at 206. See also *In Re Clara B.*, 20 Cal. App. 4th 988 (1993) (stating that a child's out of court statement admitted to show fear of father, not for truth of matter asserted). All out-of-court statements should first be analyzed to determine whether they can be admitted on non-hearsay grounds. MYERS, EVIDENCE, *supra* note 299, at 87.

sufficient indicia of trustworthiness that admission is warranted.<sup>438</sup> The residual exception has been widely used in child sexual abuse cases where a child's statements were not admissible under any other exception.<sup>439</sup> Although the flexibility of the residual exception makes it an attractive option, courts' willingness to employ it has varied widely.<sup>440</sup> In part, the courts' reluctance may stem from the lack of guidance as to "what constitutes 'sufficient indicia of reliability.'"<sup>441</sup> Factors used to determine whether the statement is sufficiently reliable include the age of the child; the nature of the event; physical evidence of the event; the relationship of the child to the defendant; the contemporaneity and spontaneity of the assertions in relation to the event; the reliability of the assertions; and the reliability of the testifying witness.<sup>442</sup> Other indicia of reliability could include the child's physical or mental condition; the circumstances of the statement; how the child was questioned; the consistency of the child's statements; the affect of the child; whether the child used age appropriate language; whether the child had a motive to fabricate; whether the statement was overheard by more than one person; whether the statement was taped; the child's level of certainty; and whether any corroborating evidence existed.<sup>443</sup>

#### e. Creative Use of Hearsay

Given the difficulty of eliciting useful testimony from children in an adversarial system, a child's hearsay statement may be the most reliable piece of evidence that a court will receive. Many statements made by children fit squarely within traditional hearsay exceptions. Children make excited utterances to police officers and domestic violence advocates after incidents of family violence.

<sup>438</sup> See Bulkley, *supra* note 419, at 691.

<sup>439</sup> See MCGOUGH, *supra* note 297, at 144-45; Truman v. Watts, 598 A.2d 713, 718 (holding that child's out of court statements to mother, child protective service workers and others were admissible under the residual exception "unless the manner in which those statements were elicited render them so unreliable as to be deemed not worthy of consideration by the Court." One commentator believes that using the residual exception is preferable to the specially crafted exceptions for child sexual abuse, which will be discussed in Part III.C.2, *infra*. See Bulkley, *supra* note 419, at 619.

<sup>440</sup> See Yun, *supra* note 411, at 1762-63. The exception has been used in numerous federal criminal child abuse prosecutions. See Truman v. Watts, 598 A.2d 713, 722 (Del. 1991) (discussing the use of the residual exception).

<sup>441</sup> MCGOUGH, *supra* note 297, at 145.

<sup>442</sup> Bertrang v. State, 184 N.W.2d 867, 870 (Wis. 1971).

<sup>443</sup> See Jee, *supra* note 428, at 586; MYERS, EVIDENCE, *supra* note 299, at 250-62; Yun, *supra* note 411, at 1758. In *Idaho v. Wright*, 497 U.S. 805, 806 (1990), the United States Supreme Court held that statements admitted under the residual exception must be found reliable based on the "totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief," without the use of extrinsic corroborating evidence. In excluding corroborating evidence, the Court was addressing concerns that unreliable statements were being bootstrapped into evidence by using other reliable evidence to bolster them. MCGOUGH, *supra* note 297, at 147. *Wright's* exclusion of outside evidence may be specific to cases involving the Sixth Amendment, however, and may not apply in the civil context. *Id.* at 249.

Statements for the purpose of diagnosis or treatment are made when children are the unintended victims of abuse. Children describe the impact of the violence to teachers, social workers, doctors and others, evidence that goes directly to the child's state of mind. Advocates should offer and judges should be open to admitting statements that fit within these exceptions in lieu of requiring the child to testify where doing so would be harmful for the child. Moreover, judges and advocates should employ the residual hearsay exception where traditional hearsay exceptions are inapposite and where the statements have sufficient indicia of reliability. Inclusion of such statements, if deemed reliable, could relieve numerous children of the burden of testifying in formal court proceedings.

In some situations, however, neither the traditional hearsay exceptions nor the residual exception will permit the inclusion of a child's out of court statement.<sup>444</sup> To address this problem, a number of states have passed special child hearsay statutes, largely in the context of child sexual abuse cases. The next section examines those statutes and proposes a hearsay statute available to child witnesses in family violence cases.

## 2. Child Hearsay Exceptions

The purpose of child abuse hearsay exceptions is to admit into evidence statements regarding child abuse that do not fit within the existing hearsay exceptions.<sup>445</sup> As the court explained in *In re Carmen O.*,<sup>446</sup> which established California's child dependency hearsay exception:

A child will be afraid publicly to accuse his or her father; the child may be cowed by the formal setting of the court; he or she may be intimidated by adverse counsel and cross-examination. Hence we often have occasion to seek means of admission of obvious hearsay statements, and we appear to achieve our objective by straining traditional hearsay concepts.<sup>447</sup>

In a majority of the states, legislatures responded to this "strain" by enacting child abuse or child sexual abuse hearsay statutes. While all of the statutes are designed to permit the admission of children's out of court statements, their components differ. Some statutes apply only to criminal cases;<sup>448</sup> others to both

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<sup>444</sup> In fact, commentators have criticized the courts for stretching the traditional exceptions beyond their bounds in seeking to admit hearsay statements in child sexual abuse cases. See Montoya, *supra* note 305, at 981; Yun, *supra* note 411, at 1759.

<sup>445</sup> See Bulkley, *supra* note 419, at 690.

<sup>446</sup> 28 Cal. App. 4th 908 (1994).

<sup>447</sup> *Id.* at 917.

<sup>448</sup> See, e.g., DEL. CODE ANN. tit. 11, § 3513 (1998); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 1998); UTAH CODE ANN. § 76-5-411 (1999). Although California's evidence code provisions apply only to criminal cases, California also has a judicially created "child dependency hearsay exception," See *In Re*.

criminal and civil cases.<sup>449</sup> Some cover only child sexual abuse,<sup>450</sup> while others allow statements regarding all forms of child abuse.<sup>451</sup> Some statutes require either that the child testify or that the child be unavailable to testify.<sup>452</sup> A child's inability to testify due to psychological trauma constitutes unavailability in a number of states.<sup>453</sup> Unavailability can also be established where "parents do not allow their child to testify because of fear of causing the child emotional distress, although there would be insufficient evidence of emotional trauma to satisfy the unavailability requirement."<sup>454</sup> The majority of the states require corroborating evidence when the child is unavailable to testify.<sup>455</sup> Most also require that the court hold a hearing to determine whether the statement is reliable prior to its admission at trial.<sup>456</sup> Although the statutes vary, essentially all "child hearsay exceptions are simply residual exceptions for children's out-of-court statements."<sup>457</sup> The factors used to assess reliability are the same under the residual exception and the child hearsay exception,<sup>458</sup> and neither is a "firmly rooted" hearsay exception.

All of these exceptions require that the statement pertain to an act of abuse or neglect perpetrated against a child. The goal, in part, is to spare the child from the trauma of testifying. But "the same compassion oddly enough has not been extended to every child who becomes enmeshed as a witness in any proceeding . . . . All children deserve special consideration when they serve as witnesses."<sup>459</sup> Therefore, "there is no reason why child sexual abuse hearsay statutes cannot be used as models for a special hearsay exception that is generally applicable to any

Carmen O., 28 Cal. App. 4th 908 (1994), for use in child abuse and neglect cases.

<sup>449</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-1416 (West 1998); COLO. REV. STAT. ANN. § 13-25-129 (West 1997); FLA. STAT. ANN. § 90.803(23) (West 1998); WASH. REV. CODE ANN. § 9A.44.120 (West 1998).

<sup>450</sup> See, e.g., ARK. R. EVID. 804(6), (7); MASS. GEN. LAWS ch. 233, §§ 81, 82 (1999); UTAH CODE ANN. § 76-5-411 (1998).

<sup>451</sup> See, e.g., CAL. EVID. CODE §§ 1228, 1360 (Deering 1998); KAN. STAT. ANN. § 60-460 (1997); VT. R. EVID. 804a.

<sup>452</sup> See, e.g., CAL. EVID. CODE § 1360 (Deering 1998); MASS. GEN. LAWS ch. 233, §§ 81, 82 (1999); MINN. STAT. ANN. § 595.02 (West 1998); S.D. CODIFIED LAWS § 19-16-38 (Michie 1999). Some states require that the child be available as a witness; however, such a requirement fails to shield the child from the trauma caused by testifying. See Montoya, *supra* note 305, at 945. This issue will be discussed in the context of a proposed model statute. See discussion *infra* Section V.B.

<sup>453</sup> See, e.g., ALA. CODE § 15-25-32 (1998); DEL. CODE ANN. tit. 11, § 3513 (1998); MO. ANN. STAT. § 491.075 (West 1998).

<sup>454</sup> See Bulkley, *supra* note 419, at 698.

<sup>455</sup> See, e.g., FLA. STAT. ANN. § 90.803 (West 1998); MD. CODE ANN., CTS. & JUD. PROC., art. 27 § 775 (1998); UTAH CODE ANN. § 76-5-411 (1999); WASH. REV. CODE ANN. § 9A.44.120 (West 1998).

<sup>456</sup> See MYERS, EVIDENCE, *supra* note 299, at 267.

<sup>457</sup> *Id.* at 249.

<sup>458</sup> See *id.* at 269.

<sup>459</sup> MCGOUGH, *supra* note 297, at 12.

proceeding in which a child is a witness.”<sup>460</sup> Lucy McGough therefore proposes a child hearsay statute that would cover all children’s testimony.<sup>461</sup> The legislature would enumerate the factors to be considered in determining trustworthiness and “the proponent would ultimately have the burden of demonstrating that, in light of all the enumerated factors, the hearsay carries substantial guarantees of trustworthiness and special evidentiary value that cannot be recaptured by in-court testimony.”<sup>462</sup> In determining trustworthiness, the court would consider the age and maturity of the child; the child’s opportunity to form an accurate impression; corroborating evidence; the interval between the experience and the report; the relationship between the child and the perpetrator; the content of and language used in the report; and whether any subsequent conflicting reports existed.<sup>463</sup> McGough’s proposed statute mandates that the child either testify at the trial or that the child be found unavailable to testify.<sup>464</sup> Finally, McGough’s proposed statute requires the court to probe the biases of the adult to whom the statement is made.<sup>465</sup>

While McGough’s proposal has much to recommend it, some of its provisions are problematic.<sup>466</sup> For example, if child hearsay statutes are designed to spare children from the trauma of testifying, why should the child have to be “unavailable” before the statement can be used? Moreover, given the empirical data that children’s reports are often inconsistent, not because they are lying but because of the function of children’s memory, why should the existence of subsequent

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*Id.* at 146. McGough acknowledges that reforms like broadening the hearsay exceptions have their dangers. “The obvious major potential cost is that if historic restraints on the receipt of children’s evidence are loosened, unreliable evidence and hence injustice will result. A second question is whether the interests of children are served by policy changes that treat children as testimonial cripples.” *Id.* at 5. Note, however, that these are potential costs; McGough suggests safeguards to minimize those costs in her model statute, as I do with mine. Both will be discussed in a later section of this Article. *See* discussion *infra* Section V.B.

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*See id.* at 152.

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Montoya, *supra* note 305, at 984-85.

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*See id.* at 978 n.392; *see also* MCGOUGH, *supra* note 297, at 153. Similarly, the American Bar Association’s proposed model child hearsay statute requires the court to consider the child’s bias or motive to lie, whether the statement was spontaneous or in response to questioning, and whether the statement was suggestive because of the use of leading questions. *Id.* at 151. Many of these precautions turn on the fear that children’s statements will be the products of suggestion or otherwise unreliable. It is important to remember, however, that the literature on children’s statements is skewed towards case studies where there were weaknesses in the child’s statement; cases where the child’s statement was reliable and credible are not publicized. *See* CECI & BRUCK, *supra* note 300, at x.

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*See* MCGOUGH, *supra* note 297, at 153.

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*See id.*

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MCGOUGH’s proposal is more restrictive, in part, because of her desire to induce advocates to videotape children’s statements, which would alleviate the need for the introduction of hearsay testimony through adult witnesses. *Id.* at 154. While I believe that videotaping would be optimal, I don’t believe that it is a service that can or will be made available to all families (especially low-income families). I am also skeptical of the notion that the child’s statement will be videotaped soon enough to make the statement more reliable than the initial hearsay declaration. No one will think to videotape the child’s statement until litigation is initiated, which may not occur immediately. For those reasons, loosening the hearsay restrictions will protect a far greater number of children and should not be brushed aside in favor of a less realistic, although theoretically more appealing, solution.

"conflicting" reports be a negative factor?

One strength of McGough's proposal, however, is its consideration of the bias of the adult listener. As she notes, "The hidden hook in the receipt of all hearsay is the nature of the relationship between declarant and listener, a hook of real danger for the reliability of children's hearsay."<sup>467</sup> This is especially true in family violence cases, where both parents have a motive to distort children's statements. Rather than simply relying on the court to judge the bias of such parties, a model statute should take the approach used by Maryland and Rhode Island's child hearsay statutes. The Maryland statute allows the admission of statements made by a child to physicians, psychologists, nurses, social workers, principals, vice principals, or school counselors acting "in the course of the individual's profession when the statement was made."<sup>468</sup> Similarly, Rhode Island permits courts to consider statements made to a person to whom the child would normally turn for "sympathy, protection or advice."<sup>469</sup> Narrowing the range of persons to whom a statement can be made confronts the problems with the bias of the adult witness.

I propose a model hearsay statute that incorporates many of the elements of McGough's, but with a few pertinent changes. First, admission of the statement would require neither that the child testify nor that the child be found unavailable.<sup>470</sup> Secondly, the court would be required to consider a range of factors surrounding the "time, content and circumstances"<sup>471</sup> of the statement, including but not limited to the age and maturity of the child; the child's opportunity to observe the event described; corroborating evidence; the interval between the experience and the report; the relationship between the child and the perpetrator; and the appropriateness of the language used in the report. Third, the child's statements could be introduced through any adult with whom the child has a relationship of trust, with the exclusion of parties to the action. Although other family members or friends might be tempted to skew their testimony to support one of the parties, removing the parents (who are most often the parties in family violence cases) from the equation both helps to keep the child from being made a pawn in litigation and decreases their incentive to manipulate the child.

Employing a hearsay exception like the one described above balances the needs of the child against the importance of the child's testimony. But a hearsay exception will not meet the needs of all children. Some may not have made out-of-court statements; others have the desire to testify in open court. What can be done,

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<sup>467</sup> *Id.* at 149.

<sup>468</sup> MD. CODE ANN., CTS. & JUD. PROC., art. 27 § 775 (1998). Maryland's statute was expanded in 1998 to permit unlicensed professionals to testify to children's hearsay statements. The change protects low-income children who do not have access to licensed professionals. Gregory P. Jimeno, *Senate Bill 688--Child Abuse--Out-of-Court Statements--Nurses*, 28 U. BALT. L.F. 44 (1998).

<sup>469</sup> R.I. GEN. LAWS § 14-1-69 (1998).

<sup>470</sup> Again, this article is concerned only with civil family violence cases, and therefore does not consider the Sixth Amendment implications of the proposal.

<sup>471</sup> See, e.g., WASH. REV. CODE ANN. § 9A.44.120 (West 1998).

then, to improve conditions for children who either have to or want to testify? The next section addresses that question.

#### D. *Improving the Testimonial Experience*

"It is peculiar to the domestic relations area that strict adherence to concepts of procedural due process must also be tempered by the need to afford protection to the child whose interests are also at stake, though she is not a party to the action."<sup>472</sup> In civil family violence cases, because there is no Sixth Amendment right to confrontation, courts have greater latitude to adjust courtroom procedures to accommodate child witnesses.<sup>473</sup> This section will suggest ways that the legal system can do just that.

##### 1. Education and Preparation

Children have a very limited understanding of the court system, its participants and conventions; as a result, the experience of testifying can be frightening if children are not adequately prepared. And "[i]n fact, why shouldn't unprepared children be frightened by the courtroom experience? They are asked to enter a formal-looking enclosure, face the American flag and an authority figure in a black gown, and submit themselves to intense and often prolonged questioning from strangers in front of an audience of grown-ups."<sup>474</sup> One way to alleviate these fears is to ensure that a child is comfortable with the courtroom setting long before the child's testimony begins.

##### a. What Do Children Understand About Court?

Although comprehension of the legal system improves as children get older, most young people believe that court is a "bad" place where only "bad" people go.<sup>475</sup> Children understand very little of the legal system and its players, rules, procedure and language.<sup>476</sup> What little they do know is too often based on misperceptions and inaccuracies.<sup>477</sup>

Children between the ages of three and seven have a visual image of the judge, but don't understand his role. They have little or no idea of what lawyers do.<sup>478</sup> The majority of these children do not understand the role of witnesses in a

<sup>472</sup> Truman v. Watts, 598 A.2d 713, 719 (Del. 1991).

<sup>473</sup> See LEMON & JAFFE, *supra* note 355, at 85.

<sup>474</sup> Nancy Walker Perry, *Children's Comprehension of Court*, FAIR\$HARE, Aug. 1993, at 8.

<sup>475</sup> *Id.* at 10.

<sup>476</sup> See *id.* at 8.

<sup>477</sup> See *id.*

<sup>478</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 68; Perry, *supra* note 474, at 9.

trial, and think that all witnesses tell the truth and are always believed.<sup>479</sup> Between the ages of eight and eleven, children begin to understand the concept of rights and recognize the court's role in settling disputes. Nonetheless, they remain confused about what actually happens in court.<sup>480</sup> At about the same age, children are more likely to say that court is neither good nor bad; towards adolescence, children begin to develop positive perceptions of the court system.<sup>481</sup> Comprehension of the court system is not aided by television or school lessons, which tend to depict it in overly simplistic terms.<sup>482</sup>

#### b. Preparation to Testify

Preparation prior to testimony can help children to alleviate the stress born of their confusion and misperceptions.<sup>483</sup> A child who is going to testify should be introduced to the court and its processes. Education about courtroom procedures and courtroom figures is one way of providing such an introduction.<sup>484</sup> Court schools in several cities provide children with an overview of the court process and their role in it, familiarizing the children and their families with the court's physical environment, the court's procedures and practices, and what is expected of them as witnesses.<sup>485</sup> Because children are literal, concrete thinkers, taking the child to the courthouse and letting the child sit in the witness chair, touch and use the microphone, and observe where others will sit in the courtroom can also help to alleviate the child's stress.<sup>486</sup> Similarly, arranging a face to face meeting between the child and a judge prior to the child's testimony can eliminate the fear of the

<sup>479</sup> See Perry, *supra* note 474, at 10.

<sup>480</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 69. At around the age of ten, children understand the role of attorneys as criminal prosecutors or defenders.

<sup>481</sup> See Perry, *supra* note 474, at 10.

<sup>482</sup> See *id.* at 9. Simply interacting with the complex and often confusing court system does not necessarily aid in comprehension either. *Id.*

<sup>483</sup> See LEMON & JAFFE, *supra* note 355, at 83; Myers et al., *Psychological Research*, *supra* note 295, at 64-65. Preparation can also increase a child's capacity to answer questions and helps children to understand the nature and seriousness of the proceedings. *Id.*

<sup>484</sup> See Montoya, *supra* note 305, at 972; see also *Parental Guidelines In Case Your Child Is Testifying in Court: Preparing Your Child to Testify*, (visited 7/11/99) <<http://www.childfind.ca/educate/jic/prepare.htm>> [hereinafter *Parental Guidelines*].

<sup>485</sup> See Montoya, *supra* note 305, at 972 (noting the work of Canada's London Family Court Clinic); *New Directions*, *supra* note 362, at 10 (mentioning programs in Los Angeles, Philadelphia and San Diego). The court school program in the District of Columbia also gives children a coloring book to teach them about the courthouse and the actors within the system and to define legal terms. The coloring book covers a number of topics of special significance to child witness, including whether it is permissible to cry in court and how to deal with embarrassment. VICTIM WITNESS ASSISTANCE UNIT, UNITED STATES ATTORNEY'S OFFICE & DISTRICT OF COLUMBIA CHILDREN'S ADVOCACY CENTER, WHAT'S MY JOB IN COURT? (1998).

<sup>486</sup> See Eyre, *supra* note 296, at 44; Nancy E. Walker & Matthew Nguyen, *Interviewing the Child Witness: The Do's and the Don't's, the How's and the Why's*, 29 CREIGHTON L. REV. 1587, 1598-99 (1996).



unknown and help the child to understand that the judge is a "real person."<sup>487</sup>

Preparation can help to enhance the quality of a child's testimony. Children can improve the accuracy of their testimony by being trained to provide complete responses, to resist misleading questions and to handle questions that they do not understand by asking the questioner to rephrase the query.<sup>488</sup> One of the most important things to teach a child prior to testifying is that answering "I don't know," "I don't remember," or "I don't understand the question," is not only permissible, but preferable.<sup>489</sup> Perhaps the most important thing to tell children, however, is that they are not responsible for the outcome of the case and that they cannot control the judge's decision.<sup>490</sup>

Education and preparation prior to trial help to alleviate the child witness' fear of the unknown. But that fear does not end when the child enters the courtroom; in fact, just the opposite is true. Steps must be taken to make the courtroom itself a friendly space for the child witness. Those steps are discussed in the next section.

## 2. The Courtroom Setting

Accommodating the needs of the child witness by reconfiguring courtroom space is firmly within the discretion of the trial judge.<sup>491</sup> Allowing the child to testify in chambers and/or modifying the physical setting in the courtroom are two options open to the trial judge.

### a. *In camera* v. Open Court

Testifying in the courtroom (as opposed to a less formal setting) can have a direct impact on the child's ability to testify accurately.<sup>492</sup> Children testifying in a courtroom setting are more likely to claim no knowledge of something about which they have personal knowledge and are less likely to accurately recall information than children testifying in a small private room outside of the presence of the perpetrator.<sup>493</sup> One study divided children into two groups; some were interviewed at school and others at court. The children who were interviewed at school (considered a more familiar, less threatening setting) recalled more information

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<sup>487</sup> Myers et al., *Psychological Research*, *supra* note 295, at 65.

<sup>488</sup> See Montoya, *supra* note 305, at 972.

<sup>489</sup> "Empowering a child to say 'I don't understand' or 'I don't know the answer' may avoid considerable confusion for the child and misinterpretation of the child's testimony by adults." MCGOUGH, *supra* note 297, at 118; see also *Parental Guidelines*, *supra* note 484, at 1; Walker & Nguyen, *supra* note 486, at 1595.

<sup>490</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 67.

<sup>491</sup> See MYERS, EVIDENCE, *supra* note 299, at 329.

<sup>492</sup> See Tomlinson, *supra* note 375, at 1603.

<sup>493</sup> See *id.* at 1604-05.

correctly through free recall than children interviewed at court.<sup>494</sup> The children interviewed at court were more likely to provide incorrect information to leading questions; the children interviewed at school made fewer errors in response to misleading questions.<sup>495</sup> The children at court perceived their experience as more stressful, and the more stressful the child perceived the setting, the fewer correct answers the child provided through free recall.<sup>496</sup>

The decision whether to meet with a child in chambers is generally within the discretion of the trial court.<sup>497</sup> Concerns about stress and about a child's unwillingness to divulge certain information in front of her parents can be alleviated by a "nonadversarial inquiry *in camera* . . . ."<sup>498</sup> Some states have provided judges with guidelines for conducting *in camera* hearings.<sup>499</sup>

But many judges are reluctant to meet with children in chambers. The judges' discomfort stems from their lack of training as well as the lack of sufficient time to spend with the child.<sup>500</sup>

Like attorneys, judges vary in their level of comfort in talking to children — particularly young children—because they do not believe they are sufficiently skilled in talking with children about difficult issues. Other judges avoid talking to children because they do not want the children to feel pressured or to feel that they will be the ones to decide who[m] they will live with.<sup>501</sup>

One judge stated that given his discomfort with interviewing children, he would

<sup>494</sup> See Karen Saywitz & Rebecca Nathanson, *Children's Testimony and Their Perception of Stress In and Out of the Courtroom*, 17 CHILD ABUSE & NEGLECT 613, 619 (1993).

<sup>495</sup> See *id.*

<sup>496</sup> See *id.*

<sup>497</sup> See, e.g., *In Re A.R.*, 679 A.2d 470, 476 (D.C. 1996) (citing 2 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 11.32 at 639 (1986), explaining that in most states, the decision is discretionary even given the responsibilities implied by the court's *parens patriae* authority). The court in *A.R.* found that the judge did not abuse her discretion by declining to interview the child *in camera*. But see *id.* at 480 (Terry, J. dissenting) (stating that a judge's refusal to ever speak with a child in chambers constitutes an abuse of discretion by virtue of her failure to exercise discretion).

<sup>498</sup> *In Re. I.B.*, 631 A.2d 1225, 1232 n.12 (D.C. 1993).

<sup>499</sup> See, e.g., Longo, *supra* note 397, at 19. Longo explains West Virginia Family Law Rule 16, which permits judges to exclude parents and lawyers from *in camera* hearings and allows records to be sealed after the attorneys review the child's testimony.

<sup>500</sup> See Wood, *supra* note 290, at 18. Wood also argues that seeing a child in chambers is unfair to the parent litigants, because the judge's decision could be based on information gleaned during that interview but not shared with the parties. *Id.*

<sup>501</sup> *In Re. A.R.*, 679 A.2d at 477. In that case, the trial court judge stated that "no Court of Appeals can require me to take children into chambers off the record and chat with them . . . . I have read enough articles and been told by enough experts in court, of what we do to children when we say . . . with no expertise whatsoever in talking to children--gee, son, whom would you like to live with . . . ." *Id.* at 473. The court apparently felt that calling the child as a witness would be less harmful, saying, "Now, if you lawyers want to call a child in a case you are perfectly free to do that." *Id.*

have the child evaluated by a mental health professional if the child's insight into the proceedings was needed.<sup>502</sup>

Should the judge choose to speak with the child in chambers, certain precautions should be taken prior to beginning the interview. First, the court should delineate the subject matter of the interview and make the goal of the interview clear to counsel, the parties, and most importantly, the child. If the information provided in the interview is not going to be kept confidential, the child must know. The court should also articulate guidelines for evaluating the child's testimony.<sup>503</sup>

#### b. Modifying the Physical Layout

Removing the child from the courtroom altogether is not the only option available to judges and advocates seeking to make testimony less traumatic for a child. Rather, the courtroom itself can be modified in order to facilitate the child's testimony.<sup>504</sup> As one court explained, "The courtroom need not be made to appear a place of horrors and is not required, by law, to have any particular configuration. It may look like a playroom, a school room, a family room or living room, so long as the necessary persons are present."<sup>505</sup> Another court concurred: "So long as the seriousness of the proceeding is not compromised, there is no objection to alterations which accommodate children."<sup>506</sup> Courts have permitted children to testify from child sized tables, joined by the judge and counsel, brought child-sized chairs into the courtroom, and allowed children to testify from underneath the prosecutor's table.<sup>507</sup> Courts could require that attorneys question children from a single, neutral place.<sup>508</sup> Laws in some states specifically provide for alterations to the courtroom setting.<sup>509</sup>

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<sup>502</sup> See *id.* at 476 n.10 (citing an interview with Judge Stephen Lachs, Presiding Judge of the Los Angeles County Superior Court Domestic Relations Department, quoted in 2 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 11.33 at 641 (1986)).

<sup>503</sup> See LEMON & JAFFE, *supra* note 355, at 86.

<sup>504</sup> See Eyre, *supra* note 296, at 44; MYERS, EVIDENCE, *supra* note 299, at 327 ("Nothing in law or the Constitution forbids circumspect modification of the courtroom to facilitate children's testimony.")

<sup>505</sup> MYERS, EVIDENCE, *supra* note 299, at 327 (quoting *In Re C.B.*, 574 S.2d 1369 (Miss. 1990)).

<sup>506</sup> MYERS, EVIDENCE, *supra* note 299, at 328. Lemon & Jaffe suggest that testimony be taken outside of the courtroom altogether; for example, the child could testify in a park--certainly a child-friendly suggestion, if not entirely a practical one. LEMON & JAFFE, *supra* note 355, at 85.

<sup>507</sup> See MYERS, EVIDENCE, *supra* note 299, at 328 (describing *Commonwealth v. Amirault*, 535 N.E.2d 193 (Mass. 1989)); see also MCGOUGH, *supra* note 297, at 10-11. The American Academy of Child and Adolescent Psychiatry recommends that the courtroom setting include child-sized furniture "to be more comfortable and familiar to small children." *Policy Statement*, *supra* note 366, at 3.

<sup>508</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 63-64.

<sup>509</sup> See, e.g., ALASKA STAT. § 12.45.046 (Michie 1998) (allowing the court to "supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance so as to safeguard the child from emotional harm or stress." The procedures include, but are not limited to, allowing the child to testify while sitting on the floor or on an appropriately sized chair; scheduling the testimony in a room that provides "adequate privacy, freedom from distractions, informality, and comfort

### 3. Conduct of Proceedings

Altering the courtroom setting is one way of facilitating child testimony. Restructuring the way that proceedings are conducted based on the presence of a child witness is another.

#### a. Questioning Child Witnesses

“When children and the justice system in this country collide, language gets in the way.”<sup>510</sup> A number of linguistic issues make testimony difficult for child witnesses. In questioning children, lawyers use vocabulary that children don’t understand and complicate their questions with confusing word orders, double negatives, and ambiguous words or phrasing and by including a number of ideas in a single question, leaving the child unsure of which part of the question she should answer.<sup>511</sup>

Children misunderstand adults’ questions because they don’t often comprehend the concepts involved; adults misunderstand children’s responses because they don’t use language as a child would.<sup>512</sup> To alleviate this confusion, actors within the legal system need to understand how to elicit information from children. For children under the ages of seven or eight, questions and sentences should be short and should contain only one query per question.<sup>513</sup> Grammatical constructions should be simple, using the active voice.<sup>514</sup> Counsel and the court should use simple words and phrases and the common meaning of terms (and possibly have the child define and use the term to show that she understands it).<sup>515</sup>

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appropriate to the child’s developmental age.”); CAL. PENAL CODE § 868.8 (West 1998) (giving court discretion to relocate persons within courtroom “to facilitate a more comfortable and personal environment for the child witness.”); CONN. GEN. STAT. ANN. § 54-86g (West 1999) (permitting the court to order that attorneys question the child from a table positioned in front of the child); W. VA. FAM. L.R. 16 (permitting the court to make physical alterations to the hearing room). Kentucky’s statute requires that the courtroom be modified through the use of small chairs. KY. REV. STAT. ANN. § 26A.140 (Banks-Baldwin 1998). In addition to making the setting less formal, judges can make their own presence less imposing by removing their robes during a child’s testimony. See CAL. PENAL CODE § 868.8 (West 1998) (authorizing judge to remove robe if judge believes that “formal attire intimidates the minor.”); LEMON & JAFFE, *supra* note 355, at 85; MCGOUGH, *supra* note 297, at 10-11.

<sup>510</sup> Anne Graffam Walker, *Children in the Courts: When Language Gets in the Way*, TRIAL, Jan. 1999, at 50.

<sup>511</sup> Common problems include the use of prepositions (on versus in), asking a child to promise to swear to the truth (when swearing means using profanity to most children), and stringing words and phrases together in ways that make their meaning difficult to understand for children. *Id.* at 50-52.; see also Myers et al., *Psychological Research*, *supra* note 295, at 40.

<sup>512</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 41.

<sup>513</sup> See *id.* at 40; see also Walker & Nguyen, *supra* note 486, at 1592-93.

<sup>514</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 40; Walker & Nguyen, *supra* note 486, at 1592-93.

<sup>515</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 40; Walker & Nguyen, *supra* note 486, at 1592-93.

Children do not develop the ability to tell time until about seven or eight years old; they should not be asked questions about time before they understand the concept.<sup>516</sup>

Many of these problems are exacerbated by the arcane and unconventional use of language within the legal system. "It is virtually never safe to assume that children understand legal terms."<sup>517</sup> Children will understand and use the common meaning for a term that may have a different denotation within the legal system.<sup>518</sup> A court is a place to play basketball. Charges are what you do with a credit card. Hearing is what you do with your ears, and parties are a place for getting presents. Swearing is like cursing, and something that you would never do with your parents sitting in the courtroom because you'd be in trouble.<sup>519</sup> Moreover, legal words may sound similar to other, more familiar words, causing confusion for children. "Jury" can sound like "jewelry," "allegation" like "alligator."<sup>520</sup>

Children are capable of testifying accurately, but only when questioned age-appropriately.<sup>521</sup> Otherwise, they will try to answer questions that they do not understand, and they will not ask for clarification.<sup>522</sup> Responsibility for ensuring that children understand what they are being asked lies with adults: in a courtroom setting, with individual counsel, and most importantly, with the judge.<sup>523</sup> When a judge fulfills this responsibility, the ultimate purpose of a trial, the finding of truth, becomes much more likely.

The judge's responsibility to manage the trial includes a duty to control the manner in which counsel question a child witness. The judge must ensure that the child understands the questions. In doing so, the court increases the likelihood that the child's answer will accurately reflect the child's knowledge, and will provide the information which the child wished to convey.<sup>524</sup>

Judges can set a number of ground rules that will enhance the reliability of children's testimony. Age-appropriate language should be used in questioning.

<sup>516</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 55. As discussed earlier, children have trouble with concepts of time and distance; questions seeking such information are likely to be problematic for them. *Id.* at 41.

<sup>517</sup> *Id.* at 54.

<sup>518</sup> See *id.*

<sup>519</sup> See *id.* at 55.

<sup>520</sup> *Id.* at 54. One child was caused a great deal of distress by the use of the word "minor." After hearing the judge's ruling, the child understood that the "miner" could live with her grandmother, but had no idea where she was going to live. Karen Saywitz, *Children's Conceptions of the Legal System: Court is a Place to Play Basketball*, in *PERSPECTIVES ON CHILDREN'S TESTIMONY* 132 (S.J. Ceci et al. eds., 1989).

<sup>521</sup> See Eyre, *supra* note 296, at 41.

<sup>522</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 56. Children will answer questions that they do not understand both because they cannot evaluate what they do not understand (they don't know what they don't know) and because of the social pressure to provide answers. *Id.*

<sup>523</sup> See *id.*; see also Eyre, *supra* note 296, at 41.

<sup>524</sup> See Eyre, *supra* note 296, at 41; see also Myers et al., *Psychological Research*, *supra* note 295, at 60.

Attorneys should not raise their voices when questioning children or when making objections during the child's testimony.<sup>525</sup> The court can limit the scope of cross-examination, precluding attorneys from asking embarrassing, marginally relevant or collateral, developmentally inappropriate, repetitive or confusing questions.<sup>526</sup> Courts can also prevent counsel from harassing child witnesses and from asking questions designed to elicit inadmissible evidence.<sup>527</sup>

A number of states have recognized the enormous importance of using appropriate language with child witnesses and have specifically empowered judges to ensure that children are questioned in an age-appropriate manner. California's evidence code provides as follows:

With a witness under the age of 14, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to insure that questions are stated in a form which is appropriate to the age of the witness. The court may in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness.<sup>528</sup>

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<sup>525</sup> Children can be frightened by raised voices and argument and are likely to personalize what appears to be anger stemming from the questioning, assuming that they have done something wrong. Myers et al., *Psychological Research*, *supra* note 295, at 73.

<sup>526</sup> See MYERS, EVIDENCE, *supra* note 299, at 313-315. Courts can also permit the use of leading questions on direct to ease the child's testimony, although the problem of suggestibility has been discussed previously. See generally 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 577-78 (1994) (discussing cases where courts permitted the use of leading questions).

<sup>527</sup> See MYERS, EVIDENCE, *supra* note 299, at 313-315. As one court noted, in a domestic relations proceeding a party's right to cross-examine a child witness must be weighed against "other interests at stake in this action, most notably those of the child." *Truman v. Watts*, 598 A.2d 713, 719 (Del. 1991). But see *Montoya*, *supra* note 305, at 953-54 (rejecting McGough's proposal to circumscribe cross-examination of child witnesses as bad evidence law and bad constitutional law).

<sup>528</sup> CAL. EVID. CODE § 765 (West 1998). See also CAL. FAM. CODE § 3042 (West 1998) (requiring that the examination of a child witness be controlled "so as to protect the best interests of the child"); CONN. GEN. STAT. ANN. § 54-86g (West 1999) (mandating that attorneys ask questions and pose objections in a manner that is not intimidating to the child); KY. REV. STAT. ANN. § 26A.140 (Banks-Baldwin 1998) (requiring that age-appropriate language be used in cases involving child victims or witnesses); UTAH CODE ANN. § 77-38-8 (1998) (requiring that questioning of children in criminal cases be conducted in age-appropriate language). Florida considered, but never voted on, a bill requiring judges to ensure that questioning of children under the age of 14 be age-appropriate, and not repetitive, hostile or harassing. Marks, *supra* note 390, at 49. Sensitivity to language and questioning can also be achieved via the more general statutes enacted by some states. New York requires judges to be sensitive to the "psychological and emotional stress a child witness may undergo when testifying." N.Y. EXEC. LAW § 642-a (McKinney 1999). Massachusetts allows the court to take "appropriate means . . . to protect a child witness from trauma during a court proceeding." MASS. GEN. LAWS ANN. ch. 278, § 16D (West 1998). Still other states have recognized the child's need for age-appropriate explanations about the proceedings in which they will be involved and have incorporated a requirement for such explanations into child victim and witness's rights statutes. See, e.g., COLO. REV. STAT. ANN. § 24-4.1-304 (West 1998); DEL. CODE ANN. tit. 11, § 5134 (1998); N.D. CENT.

Many of these state laws apply only to criminal cases or to child abuse cases. But as with the hearsay exceptions discussed earlier, children in all types of cases face similar problems with language and questioning. Judges certainly have the discretion to protect children in their courtrooms, and advocates could voluntarily be more sensitive to the needs of child witnesses. But to ensure that children are questioned in an appropriate manner, states should expand their language legislation to encompass all cases where children are witnesses, and should certainly apply them to cases likely to cause children significant trauma as witnesses—family violence cases.

b. Breaks

Sitting and concentrating for long periods of time can be difficult for children. The child, however, will not monitor his own needs and may be afraid to ask the court to recess. Again, adults must be responsible for ensuring that the child's needs are met.<sup>529</sup> Children need regularly scheduled, frequent breaks during testimony.<sup>530</sup> The court should also recess whenever the child seems fatigued or displays signs of a loss of attention or unmanageable stress.<sup>531</sup>

c. Supportive Persons

Research indicates that for some children, the presence of a supportive adult increases their ability to testify (both on direct and on cross-examination).<sup>532</sup> The presence of supportive adults, therefore, can also enhance the truth-finding process.<sup>533</sup> Moreover, having a supportive person present during testimony can help to ease the child's fears, especially if the child is testifying against someone he previously trusted.<sup>534</sup> The adult support person can simply be present in the courtroom, or can sit at counsel table or stand by the child during his testimony.<sup>535</sup>

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CODE § 12.1-35-02 (1997); R.I. GEN. LAWS § 12-28-9 (1998); WASH. REV. CODE ANN. § 7.69A.030 (West 1998); WIS. STAT. ANN. § 950.055 (West 1999).

<sup>529</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 70.

<sup>530</sup> See CAL PENAL CODE § 868.8 (West 1998) (allowing child witness "reasonable periods of relief from examination and cross-examination" in court's discretion); KY. REV. STAT. ANN. § 26A.140 (Banks-Baldwin 1998) (requiring frequent breaks in proceedings involving child victims or witnesses). Myers, Saywitz & Goodman recommend every twenty minutes. Myers et al., *Psychological Research*, *supra* note 295, at 63-64; see also LEMON & JAFFE, *supra* note 355, at 85. California also permits the court to limit the taking of the child's testimony to times when the child is normally in school, which helps the child to maintain a normal schedule. See CAL. PENAL CODE § 868.8 (West 1998).

<sup>531</sup> See Myers et al., *Psychological Research*, *supra* note 295, at 70; see also ALASKA STAT. § 12.45.046 (Michie 1998) (allowing court to "order a recess when the energy, comfort, or attention span of the child warrants").

<sup>532</sup> See MYERS, EVIDENCE, *supra* note 299, at 324.

<sup>533</sup> See *id.*

<sup>534</sup> See Eyre, *supra* note 296, at 42.

<sup>535</sup> See LEMON & JAFFE, *supra* note 355, at 85; MYERS, EVIDENCE, *supra* note 299, at 324.

The child could even testify while sitting on the supportive person's lap.<sup>536</sup>

Courts have the discretion to allow supportive persons to be present during testimony in any of the guises described.<sup>537</sup> A number of states and the federal government have specifically authorized judges to permit the presence of supportive persons during child witness testimony.<sup>538</sup> Utah's statute is slightly different, allowing the court to appoint an advisor for the child to be present during the testimony and to assist a child aged thirteen or younger in understanding counsel's questions.<sup>539</sup>

Unfortunately, the majority of these statutes apply only in criminal cases or in cases of child abuse, depriving the child witness in a family violence case (or other type of case) of their protection. Again, states should recognize that testifying in any type of case can be traumatic for a child, and extend the provisions allowing the presence of supportive persons to all child witnesses. In the interim, courts should use their discretion to allow children to be accompanied during their testimony.

A range of issues is raised by the role of the child as witness in family violence proceedings. While the provisions described above assist the child in her role as a witness, they do not address needs that the child has as a person in her own right. The next section will look at the child as a person, deserving of representation and supportive services to alleviate the harm caused by family violence.

## V. CHILDREN AS PERSONS: SERVICES FOR THE CHILD

Brad Wells, the child first described in the introduction, had very specific views about the continuation of his relationship with his father. He wanted to live with his mother, stepfather and sisters. He wanted to visit his dad on alternate weekends, but he didn't want those visits to prevent him from participating in choir

<sup>536</sup> See MYERS, EVIDENCE, *supra* note 299, at 324. At the very least, the child should be able to bring his favorite toy or stuffed animal with him when he testifies. Myers et al., *Psychological Research*, *supra* note 295, at 71-72.

<sup>537</sup> See, e.g., Commonwealth v. Amirault, 535 N.E.2d 193 (Mass. 1989) (parent sat with child during testimony); MCGOUGH, *supra* note 297, at 10-11.

<sup>538</sup> See, e.g., 18 U.S.C. § 3509(i) (1998) (giving child the right to have adult attendant present for emotional support and permitting the court to allow the adult to remain in close proximity to the child, in contact with the child, or allow the child to sit on the adult's lap while the child testifies, so long as the adult attendant does not prompt the child or provide the child with answers); ARK. CODE ANN. § 16-42-102 (Michie 1997) (allowing any person with custody of child to be present during child's testimony); CONN. GEN. STAT. ANN. § 54-86g (West 1999) (authorizing an adult with whom the child feels comfortable to sit in close proximity to the child while child testifies); DEL. CODE ANN. tit. 11, § 5134 (1998) (giving child witness the right to be accompanied by a "friend" in all proceedings); N.D. CENT. CODE § 12.1-35-05.1 (1997) (requiring court to allow individual to sit with, accompany, or be in proximity to child under fourteen years of age during testimony; permitting court to allow accompaniment for person over fourteen); R.I. GEN. LAWS § 12-28-9 (1998) (providing that child can be accompanied during all proceedings by "relative, guardian, or other person who will contribute to the child's sense of well being").

<sup>539</sup> See UTAH CODE ANN. § 77-38-8 (1998); see also Eyre, *supra* note 296, at 39, 42.



rehearsals. Brad's father, who was frequently late with child support and who was taking medication for mental illness, did not have a strong foundation from which to advocate for visitation; his mother was unwilling to request visitation, although she recognized that Brad wanted to see his father.<sup>540</sup>

Demetrius and Donald were physically abused by their father and witnessed the abuse of their mother. Their school counselors noted problems with behavior when the children visited with the father. The children needed counseling services to address the issues raised by the history of violence but their mother could not afford such services and the counselors were unaware of any free referrals. The children continued to act out, impeding their ability to learn and straining their relationships with teachers and other children.

Brad's unique position on issues of custody and visitation was heard by the court only because the court had appointed a representative for Brad. Demetrius and Donald received counseling services specially tailored to child witnesses of domestic violence because the court system provided such services to families within its jurisdiction. Providing representation and counseling for children are crucial steps towards developing a legal system that treats children as persons. Such programs will be discussed in this section.

#### A. *Representation for the Child*

"One of the most fundamental principles in the legal system is that when a person has an interest in the outcome of a legal proceeding, he has a right to representation."<sup>541</sup> Building on that principle, the United States Supreme Court in 1967 first recognized a child's right to counsel in delinquency proceedings<sup>542</sup>; since that time, the number of lawyers in the United States appointed to represent children in various types of cases has exploded.<sup>543</sup> The international community (with the exception of the United States and Somalia) has also embraced the notion that children have the right to be heard, directly and with the assistance of effective counsel, in all legal proceedings affecting their lives and interests.<sup>544</sup>

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<sup>540</sup> Brad's parents, like the majority of litigants in the domestic violence and domestic relations courts of the District of Columbia, were unrepresented. Even if they had been represented, however, the attorney for the parent owes no duty to the child and is not required to advocate the child's position, especially where that position is adverse to the parent's. Candice M. Murphy-Farmer, *Mandatory Appointment of Guardians ad Litem for Children in Dissolution Proceedings: An Important Step Towards Low-Impact Divorce*, 30 IND. L. REV. 551, 555 (1997). See discussion of justifications for appointing representatives for children, *infra* text accompanying notes 549-80.

<sup>541</sup> *Id.* at 554.

<sup>542</sup> *In re Gault*, 387 U.S. 1, 41 (1967).

<sup>543</sup> See Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L. J. 299, 301-02 (1998) [hereinafter Guggenheim, *Reconsidering the Need*]. Guggenheim believes that there have been two phases in the development of children's representation: first, the explosion of the right to representation, and later, the consideration of the role of the representative. *Id.* at 303-04.

<sup>544</sup> Article 12 of the United Nations Convention on the Rights of the Child states:

1. States parties shall assure to the child who is capable of forming his or her own

But a child's right to independent representation in intrafamily cases is not well-established.<sup>545</sup> Although judges have discretion to appoint counsel for children in family violence cases,<sup>546</sup> they are only rarely required to do so,<sup>547</sup> and tend to exercise their discretion sparingly.<sup>548</sup>

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views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

Convention on the Rights of the Child, G.A. Res. 44/25; U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/Res/44/736 (1989), reprinted in 5 GEO. J. FIGHTING POVERTY 123, 128 (1998). See also Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 255 (1991) [hereinafter Davidson, *Right To Be Heard*]; Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L. Q. 53, 54 (1992).

<sup>545</sup>

See Davidson, *Right To Be Heard*, *supra* note 544, at 269-70. Some commentators have suggested that the child be given party status, with the accompanying right to representation, in these types of proceedings. See Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 285 (1998); see also Guggenheim, *Reconsidering the Need*, *supra* note 543, at 334-35 (suggesting that the expansion of a child's procedural right to counsel in custody cases be rethought in light of the child's less inclusive substantive rights, i.e., to party status). The courts that have considered this question, however, have denied children standing in their parents' custody and visitation cases. See, e.g., Auclair v. Auclair, 730 A.2d 1290 (Md. 1999); Miller v. Miller, 677 A.2d 64 (Me. 1996); *In re Marriage of Thompson*, 651 N.E. 2d 222 (Ill. 1995); *In re Marriage of Hartley*, 886 P.2d 665 (Colo. 1994); J.A.R. v. County of Maricopa, 877 P.2d 1323 (Ariz. 1994); Shienovold v. Habie, 622 So. 2d 538 (Fla. 1993). In part, standing has been denied because the states' statutes provided for representation by *guardians ad litem*, guaranteeing that the child's interests were already being given requisite consideration. Auclair, 730 A.2d at 1269-70 ("Because [the *guardian ad litem*] is obligated to represent the children's best interests, the interests she will advocate are identical to the children's interests, even though the children may not agree with her best-interest recommendation. . . . The children are not entitled to additional representation of their preferences.") *Id.* at 1269-70. Whether a *guardian ad litem*, in her traditional role, is an adequate substitute for counsel for the child will be discussed in Section 2, *infra*.

<sup>546</sup>

See Davidson, *Right To Be Heard*, *supra* note 544, at 270; Lidman & Hollingsworth, *supra* note 545, at 263; Peterson, *supra* note 18, at 516.

<sup>547</sup>

Minnesota, for example, requires appointment of a representative for the child where there is reason to believe the child has been the victim of domestic violence. Wisconsin requires that children be represented in all contested custody cases. See Peterson, *supra* note 18, at 516; Lauren Young, *Children of Violent Homes, Greatest Victims--Littlest Voices: The Need for Children's Counsel in Disputed Custody Cases*, 6 MD. J. CONTEMP. L. ISSUES 47, 54 (1995).

<sup>548</sup>

See generally Peterson, *supra* note 18. Some argue that courts are right to use caution in providing representation for children. Most prominently, Professor Martin Guggenheim believes that courts and legislatures have failed to identify the benefits of appointment of counsel or consider the problems created by appointing counsel for children. Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 77 (1984) [hereinafter Guggenheim, *Right to Be Represented*]. He contends that the substantive law of custody, which cites the child's preference as but one factor in making custody determinations, is subverted by the appointment of counsel, which creates the risk that the child's perspective will be elevated unduly by virtue of counsel's zealous representation on the child's behalf. Guggenheim, *Reconsidering the Need*, *supra* note 543, at 304; Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. L. 35, 53-54 (1995) [hereinafter Guggenheim, *Making of Standards*]; see also Frances Gall Hill, *Clinical Education and the "Best Interest" Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 73 IND. L. J. 605, 613 (1998) (arguing that children's wishes should not be weighed more than other factors and advocating use of *guardian ad litem* rather than an attorney to avoid over-emphasis on child's preference).

Despite the judges' reluctance, there are powerful reasons for providing representation for children in cases involving family violence. The next section will look at the justifications, both generally and specifically in family violence cases, for appointing representatives for children.

# 1. Why Do Children Need Representation?

## a. Presumption Against Parents

At common law, children's rights derived from those of their parents; parents were presumed fit and able to advocate on behalf of their children.<sup>549</sup> But where a child's interests are adverse to those of his parents, the presumption that parental judgment can be substituted for a child's choices is rebutted.<sup>550</sup>

Children's interests are likely to be adverse to those of at least one of their parents in family violence cases.<sup>551</sup> The child's substantive legal interest in choosing to live with a non-violent parent, to visit with a violent parent, or to provide testimony about the impact of the violence, as well as the child's procedural interest in seeing the litigation end quickly and with a minimum of hostility, will often be adverse to the interests of one or both parents. Because the parents' attorneys owe no duty to the child, the attorneys may advocate in a manner that is detrimental to the child's interests, depriving the child of any protection.<sup>552</sup> A parent may refuse to disclose information that undermines her case but that is crucial to understanding the child's situation and the child's choice.<sup>553</sup> If the child is unrepresented, parents and their attorneys become the "voice" for the child and have the ability to silence the child or manipulate the child's expressed opinions, beliefs, and fears.<sup>554</sup> Representation for the child is crucial when the child's interests depart from those of the parents, and "[t]he trend in favor of independent counsel reflects a growing awareness that the state, the courts, and even parents do

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<sup>549</sup> See Frank P. Cervone, *Counsel for the Child*, LITIGATION, Summer 1995, at 8-9; Davidson, *Right To Be Heard*, *supra* note 544, at 257-58.

<sup>550</sup> See Angela D. Lurie, *Representing the Child-Client: Kids Are People Too; An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 206 n.7 (1993); Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CALIF. L. REV. 681, 684-85 (1987).

<sup>551</sup> See, e.g., *Ford v. Ford*, 371 U.S. 187, 193 (1962) (examining parents' inability to represent the child's interests in a custody case); Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1826 (1996) (describing conflict between interests of child and parents in custody case as "glaring"); Murphy-Farmer, *supra* note 540, at 554-55 (discussing divorces); Peterson, *supra* note 18, at 532 (discussing divorce/custody cases).

<sup>552</sup> See American Bar Association Section on Family Law, *Draft: Principles for Appointment of Representatives for Children in Custody & Visitation Proceedings*, October 6, 1998, at 5 (hereinafter *Principles*); William D. Horn, *Mandating Appointment of an Attorney for Children in Divorce*, 27 FAM. L. Q. 473, 479 (1993). The problems specific to zealous advocacy on behalf of all parties but the child in family violence cases will be discussed below.

<sup>553</sup> See Guggenheim, *Making of Standards*, *supra* note 548, at 40-41; Hill, *supra* note 547, at 613; *Principles*, *supra* note 552, at 5.

<sup>554</sup> See Guggenheim, *Making of Standards*, *supra* note 548, at 40.

not adequately represent the child's interests."<sup>555</sup> For that reason, judges seek independent advocates, ". . . free of the influence of either parent or any other person using the litigation to promote a cause."<sup>556</sup>

#### b. Child Centrality/Child Protection

"As a society we encourage families to include children in family meetings and discussions and to give children choices among appropriate options in matters concerning their day-to-day lives. However, we frequently exclude them entirely from any direct participation in the court proceedings that affect them directly."<sup>557</sup> Few decisions are as central to a child's life as decisions about protection, custody and visitation, and few have as great a potential for harm if made without sufficient information and deliberation. Custody and visitation actions can make children feel as though they are responsible for the separation of their parents; the family, in choosing sides, may alienate the child's affections from one parent or the other.<sup>558</sup> "The child's entire world is in turmoil. Life as he or she knows it is at risk. At such a time, the child believes that 'he is the source, if not the cause, of the contention.'"<sup>559</sup>

In such cases, the child's representative can both ensure that the child is an active participant in the decisions that will profoundly affect her life and shield her from the harm that the process that generates those decisions can cause.<sup>560</sup> Representatives for children prevent unnecessary delays in litigation and procure supportive services for the child client.<sup>561</sup> The child's representative can ensure that "the child's life is not made miserable by terms of visitation that interfere with the child's need to live a secure and stable life."<sup>562</sup> Appointing a representative for the child increases the likelihood that the child's needs, wants and rights are the central

<sup>555</sup> Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L. Q. 349, 350 (1993); but see Hill, *supra* note 547, at 613 (explaining argument that custody disputes are essentially private matters in which parents safeguard the child's best interests).

<sup>556</sup> Elrod, *supra* note 544, at 55.

<sup>557</sup> Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939, 953 (1995) [hereinafter Haralambie, *Role of Child's Attorney*].

<sup>558</sup> See *Principles*, *supra* note 552, at 2.

<sup>559</sup> Young, *supra* note 547, at 50 (citation omitted). If not handled carefully, court proceedings "can cause permanent damage to the child's psyche and ability to function." *Id.*

<sup>560</sup> See *Principles*, *supra* note 552, at 6; Wilber, *supra* note 555, at 351. One study of divorce suggested that the best thing that the child's attorney can do for the child is to keep the child out of the divorce case and ensure that the child's regular activities proceed without interruption. See Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIM. LAW 45, 58 (1993).

<sup>561</sup> See Wilber, *supra* note 555, at 351. "Uncertainty and instability of placement can have a particularly negative effect on children, who cannot control the decisions about where and with whom they live. The prolonged uncertainty brought on by protracted court battles inflicts its own harm on children." ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* 27 (1993) [hereinafter HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE*].

<sup>562</sup> *Principles*, *supra* note 552, at 6.

focus of the litigation,<sup>563</sup> giving parents an incentive to settle the children's issues first<sup>564</sup> and to confront the effects of their own behavior on the child.<sup>565</sup>

### c. Empowering the Child

The single most important reason for appointing a representative for a child is to guarantee that the child has a voice in the proceedings.<sup>566</sup> Even when the child's position is substantially the same as that of another party, it should be presented; "[t]he child's position is never superfluous."<sup>567</sup> Denying the child the choice to be involved in court proceedings disregards the child's personhood.<sup>568</sup> The shift towards thinking of the child as a person with the right to be heard, rather than as the chattel of the parents, is reflected in the increased appointment of representatives for children.<sup>569</sup>

Especially in domestic relations cases, where the child has no formal party standing, representation ensures that the child has a voice. The child had no voice in the formation of the family or in the decision to dissolve the family, but should have some say in where she will ultimately land.<sup>570</sup> "[T]he child needs an advocate who will plead his or her cause as forcefully as the attorneys for competing custody claimants plead theirs."<sup>571</sup>

Ultimately, "[t]he participation of the child in the decision-making process empowers him and his sense of alienation is decreased."<sup>572</sup> Participation in court proceedings involving them imbues children with a sense of justice and fairness.<sup>573</sup>

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<sup>563</sup> See Guggenheim, *Making of Standards*, *supra* note 548, at 40.

<sup>564</sup> See Horn, *supra* note 552, at 476.

<sup>565</sup> See Murphy-Farmer, *supra* note 540, at 562.

<sup>566</sup> See Hill, *supra* note 547, at 613; see also *Principles*, *supra* note 552, at 7 (explaining that the greatest need for a lawyer in custody/visitation proceedings is to advance the child's position in the case).

<sup>567</sup> Wilber, *supra* note 555, at 351.

<sup>568</sup> See Haralambie, *Role of Child's Attorney*, *supra* note 557, at 953.

<sup>569</sup> See Elrod, *supra* note 544, at 54.

<sup>570</sup> See Murphy-Farmer, *supra* note 540, at 561. "Many commentators argue that the fundamental fairness of due process requires appointment of counsel for the child in all contested custody cases." Peterson, *supra* note 18, at 514. But see Guggenheim, *Making of Standards*, *supra* note 548, at 41 (allowing child to participate may foster undue pressure on the child to choose one parent over another, causing the child to feel overwhelmed by the responsibility and creating danger of parental manipulation of the child).

<sup>571</sup> HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE*, *supra* note 561, at 30 (citing *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977)).

<sup>572</sup> Wilber, *supra* note 555, at 355.

<sup>573</sup> See Lyon, *supra* note 550, at 686.

## d. Justifications in Family Violence Cases

"While an argument could be made for appointing counsel for children in every case . . . there is a compelling need for counsel in judicial proceedings when physical, sexual, or emotional abuse or neglect is alleged . . ."<sup>574</sup> Children become third party victims in abusive homes, and their interests "should receive equal consideration and, if required, adversarial equity."<sup>575</sup> In family violence cases, representatives for children play a number of important roles. Parents may have an incentive to hide issues of family violence; the child's representative can bring such issues to the fore, especially as they relate to the issue of joint custody.<sup>576</sup> The batterer's ability to use the child as a pawn is minimized by the presence of an independent voice for the child's wishes.<sup>577</sup>

Some commentators argue that appointment of representatives for children should be mandatory in family violence cases. Because the batterer may minimize or block inquiries into the violence, judges often lack sufficient information to understand why the child needs representation.<sup>578</sup> Moreover, the battered parent might not disclose the abuse for fear of retaliation or of losing the child, given the perception that someone who tolerates abuse is not a fit parent.<sup>579</sup>

Appointing a representative for a child in a domestic violence case "does not assume that parents would not instinctively seek to represent the best interests of their child in seeking protection. Instead the judge and the attorneys in the case have an opportunity to seek assurance that the child's safety and well-being are addressed as a separate area of inquiry . . ."<sup>580</sup> Especially in cases of family violence, where at least one parent's interests almost certainly diverge from the child's, where the child needs protection, and where the child needs to regain a feeling of empowerment, representation for the child is crucial.

There are powerful justifications for appointing representatives for

<sup>574</sup> Young, *supra* note 547, at 48; see also *New Directions*, *supra* note 362, at 12-13; Peterson, *supra* note 18, at 535.

<sup>575</sup> Tara Lee Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian ad Litem*, 66 N.D. L. REV. 633, 646 (1990).

<sup>576</sup> See The Honorable Sheila M. Murphy, *Guardians ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L. J. 281, 287 (1999). "Expediting custody proceedings by eliminating this issue and withholding domestic violence information from the judge is unacceptable." *Id.* at 288.

<sup>577</sup> See *id.* The representative may also present information on how the battered parent is coping with the violence and what the impact of the violence on her ability to parent has been. *Id.* at 289-90. While such information is certainly relevant to the well-being of the child, especially where the child expresses a desire to leave the care of the battered parent, it raises red flags for battered women's advocates, who fear that battered women will be punished doubly: once by the batterer, and again by the system. Judicial education, as discussed in Part II, *infra*, can help judges to account for the survivor's actions and to craft remedies that are sensitive to the needs of both the child and battered parent.

<sup>578</sup> See Peterson, *supra* note 18, at 518-19.

<sup>579</sup> See *id.* at 521.

<sup>580</sup> Muhlhauser, *supra* note 575, at 646.

children in family violence cases. What form that representation should take has been the subject of considerable debate, and is the subject of the next section.

## B. *Attorney v. Guardian ad Litem: Which Model Is Better for Kids?*

Perhaps no question is more hotly contested by child advocates than what role an attorney representative for the child should play.<sup>581</sup> While most states that authorize the appointment of advocates for children statutorily require that the child's interest be represented, "it is unclear whether the child's preferences should be advocated in addition to or in lieu of the minor's best interests."<sup>582</sup> The tension between the traditional attorney model (representing the child/client's expressed preferences) and the *guardian ad litem* model (representing the child's best interest) is at the heart of the debate.

### 1. The Traditional Representation Model

A number of commentators have forcefully argued that the only acceptable position for an attorney representing a child is the traditional attorney/client relationship model, where the child client directs the representation and the attorney advocates for the position expressed by the child client, regardless of her personal feelings about the child's choices.<sup>583</sup> The traditional model requires that the lawyer,

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<sup>581</sup> This section is focused on attorney representation of children in family violence cases. The issues are somewhat different (and less contentious) when lay *guardians ad litem* or Court Appointed Special Advocates (CASAs) serve as the representative for the child. Because my argument is ultimately that the child should have independent competent counsel representing her, the issues surrounding lay representation are not considered here.

<sup>582</sup> Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655, 1685 (1996); see also HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE*, *supra* note 561, at 2. As Martin Guggenheim notes, courts and legislators have been singularly unhelpful in illuminating the issue. Guggenheim, *Reconsidering the Need*, *supra* note 543, at 305, 307. Courts "set lawyers loose to represent children and, on the other [hand], [believe] that it is unimportant to tell those lawyers what is expected of them." *Id.* at 310. But see FLA. STAT. ANN. § 61.403 (West 1998) ("A guardian ad litem when appointed shall act . . . not as attorney or advocate but shall act in the child's best interest.").

<sup>583</sup> See, e.g. Guggenheim, *Reconsidering the Need*, *supra* note 543, at 312; Rabin, *supra* note 52, at 1117; Ventrell, *supra* note 112, at 260. The American Academy of Matrimonial Lawyers and the Fordham Conference on the Ethical Representation of Children have all adopted this approach. See generally American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings*, 13 *J. AM. ACAD. MATRIM. LAW* 1 (1995); Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 *FORDHAM L. REV.* 1281 (1996); see also Veazey v. Veazey, 560 P.2d 382, 390 (Alaska 1977) ("The basic premise of the adversary system is that the best decision will be reached if each interested person had his case presented by counsel of unquestionably undivided loyalty."). But see Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1706 (1996) (arguing that children's misperceptions of their attorneys' roles "make[] a mockery of the entire role debate").

This does not mean, however, that the lawyer should not attempt to discern what the child's best interest is. The lawyer should attempt to determine the best interest for a number of reasons: because it is the ultimate issue in the case; because conversations with other professionals will revolve around the idea of the best interest; and because choices in strategy and counseling will be made based in part on influencing the best interest determination. See Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed*

to the extent possible, maintain a regular attorney/client relationship with the child, with the same ethical constraints as a traditional attorney.<sup>584</sup> "The attorney appointed as an attorney for the child . . . owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as he or she would to an adult client . . . ."<sup>585</sup> Extending the client-centered decision-making model to child clients assumes that children are capable of making reasoned choices about central events in their lives. Children should not be held to a higher standard than adult clients, who frequently make irrational choices for which their lawyers must advocate.<sup>586</sup> "[L]awyers can and must individualize every representation, in a way that allows the maximum possible participation of the client so that the representation reflects the uniqueness of each child client."<sup>587</sup> The traditional attorney/client relationship can be modified only when the lawyer determines that crucial elements of the relationship with the child cannot be maintained.<sup>588</sup> The child's ability to direct the representation turns on whether the child can distinguish between available options<sup>589</sup>; when the child is unable to do so, the attorney must determine how best to advocate for the child.<sup>590</sup>

The strength of the traditional attorney/client model is that it gives the child a real voice in the proceedings. "A child capable of forming a reasonable position should be able to have that position advocated—otherwise nobody is

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*Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1513 (1996).

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See HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE*, *supra* note 561, at 25; Lidman & Hollingsworth, *supra* note 545, at 266. Ethical rules for the child's attorney: the child's attorney should be a zealous advocate, should provide competent representation, should abide by the client's decisions, should provide diligent and prompt representation, should communicate effectively and thoroughly with the client, should not communicate with represented parties or accept payment from a third party, should avoid conflicts of interest, and should maintain confidentiality and privileges for the child client. Ventrell, *supra* note 112, at 270-72.

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HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE*, *supra* note 561, at 12. The Model Rules of Professional Conduct require that an attorney for a child maintain the traditional role "as far as reasonably possible." MODEL RULES OF PROFESSIONAL CONDUCT 1.14(a) (1983).

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See Wilber, *supra* note 555, at 353-54.

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Peters, *supra* note 573, at 1509.

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See *id.* at 1507.

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See Elrod, *supra* note 544, at 65.

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Commentators offer several potential approaches for advocating on behalf of an impaired child. The American Association of Matrimonial Lawyers Standards prohibit attorneys from taking a position on behalf of a child who cannot articulate one. Other commentators allow lawyers in limited circumstances to advocate for a specific result where there is a "definitively preferable option." Guggenheim, *Reconsidering the Need*, *supra* note 543, at 329. Professor Guggenheim suggests that lawyers for very young or preverbal children can advocate for the child's "legal interest." *Id.* at 328-29. Shannan Wilber argues that when the child client is impaired, the attorney should substitute her judgment for what the child would want if the child could direct the representation. Wilber, *supra* note 555, at 349, 359. Linda Elrod maintains that if the child is not able to direct the representation, the attorney should advocate what she perceives to be the child's best interests. Elrod, *supra* note 544, at 65. Jinanne Elder suggests that the attorney for an impaired child explore and define the needs of the particular child in the particular case and advocate a position on the child's behalf that maximizes the attainment of the client's objectives and minimizes harm or prejudice to the client and her interests and needs. Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, BOSTON B.J. Jan./Feb. 1991, at 6, 9.



presenting the child's position from the child's perspective."<sup>591</sup> As in any traditional attorney/client relationship, the attorney can and should counsel the child about the ramifications of any decision that the child makes, but ultimate decisionmaking authority rests with the client.<sup>592</sup> Children are disempowered when their attorneys, who are supposed to be their advocates, take positions that are contrary to their wishes. When the child perceives that the advocate has heard and presented her views, a child can accept even an adverse result more easily.<sup>593</sup>

Assuming the traditional attorney/client relationship also maintains the appropriate balance of power between the parties and the court. The "personality, personal opinions, values and beliefs" of the attorney should not influence the court's final determination.<sup>594</sup> Providing counsel for the child equalizes the child's power in relation to other parties in the matter, but does not give the child a disproportionate voice. "It is not the province of the child or his attorney to decide the case; rather it is the court's responsibility to do so after considering the viewpoints of the parties and experts."<sup>595</sup> The traditional model constrains the lawyer's ability to exercise independent judgment about what is best for the client, reserving that role for the judge.<sup>596</sup>

The traditional model has detractors. First, determining when a child client is impaired is difficult, which can diminish the attorney's confidence that the child is competent to direct the representation.<sup>597</sup> If the child is too young to direct the representation, providing an attorney for the child does not really give the child a voice in the proceedings. "If four-year-olds have a right to be heard but cannot speak for themselves, how is the attorney for the child to determine what is to be said on the child's behalf?"<sup>598</sup> Moreover, assuming that an attorney is actually voicing the child's expressed wishes may be dangerous. "When lawyers are assigned to speak for children, we are assured only that another adult will be heard; with the class and cultural differences that separate many lawyers from their clients, what the lawyer has to say frequently tells us nothing about what the child

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<sup>591</sup> Haralambie, *Role of Child's Attorney*, *supra* note 547, at 954; *see also* HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE*, *supra* note 561, at 12; Lyon, *supra* note 550, at 692.

<sup>592</sup> *See* Lurie, *supra* note 550, at 209. "If the child's preference is contrary to what counsel believes is in the child's best interests and the child cannot be persuaded otherwise, the child's counsel must present the child's position, withdraw, or perhaps ask that a *guardian ad litem* be appointed." Elrod, *supra* note 544, at 66.

<sup>593</sup> *See* Wilber, *supra* note 555, at 355.

<sup>594</sup> Guggenheim, *Reconsidering the Need*, *supra* note 543, at 301.

<sup>595</sup> Wilber, *supra* note 555, at 356.

<sup>596</sup> *See* Guggenheim, *Reconsidering the Need*, *supra* note 543, at 312. Reducing lawyer discretion helps to reduce the danger that the attorney's values or opinions will be interjected into the proceedings and to ensure uniform performance from attorneys in similar types of cases. *Id.* at 313.

<sup>597</sup> *See* Guggenheim, *Right to Be Represented*, *supra* note 548, at 77; Hill, *supra* note 547, at 621.

<sup>598</sup> Guggenheim, *Right to Be Represented*, *supra* note 548, at 96.

wants or needs.<sup>599</sup> Additionally, maintaining the duty of confidentiality to a child client could actually be dangerous for the client; children may reveal information about their safety or other issues that must be kept confidential despite the risk posed for the client if the attorney does not act.<sup>600</sup> Similarly, given that the attorney must forward the child's expressed wishes, the attorney could find herself advocating for a position that is the result of parent manipulation or that is illogical or irrational.<sup>601</sup>

## 2. The *Guardian ad Litem* Model

Although the *guardian ad litem* (GAL) may be an attorney, she is generally considered an officer of the court rather than an independent advocate for the child.<sup>602</sup> In almost every case, the attorney appointed as *guardian ad litem* is expected to advocate for the child's best interest rather than the child's expressed wishes or desires.<sup>603</sup> While the primary function of the GAL is not to zealously advocate for the child's desires, the GAL should determine whether the child wants to take a position and articulate the child's position to the court; nonetheless, the GAL ultimately decides what weight to give the child's desires in her overall presentation.<sup>604</sup>

Whether the attorney acting as a *guardian ad litem* is bound by the ethical rules governing the attorney/client relationship is another subject of debate. Arguably, because the attorney is representing the child's best interest rather than the child himself, no attorney/client relationship exists with the child, and therefore,

<sup>599</sup> *Id.* at 154-55.

<sup>600</sup> See Hill, *supra* note 547, at 621-22.

<sup>601</sup> See *id.* at 622.

<sup>602</sup> See 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 12.05 at 542 (1994); Muhlhauser, *supra* note 575, at 639.

<sup>603</sup> See Lidman & Hollingsworth, *supra* note 545, at 268; Lurie, *supra* note 550, at 237. Tara Lea Muhlhauser suggests, however, that while *guardians ad litem* should represent the child's interests, as distinct from the child's wishes, the whole concept of "best interest" needs reexamination. "To state that *guardians ad litem* represent the 'best' interests is to assume that their recommendations should have precedence over the state's recommendation or the parent's resolution." Muhlhauser, *supra* note 575, at 641-42. She suggests that *guardians ad litem* examine the child's "better" interests. The question of whether GALs usurp the judicial function through the best interest determination is considered in the text accompanying notes 608-09.

Role conflict is a real concern for the *guardian ad litem* model. Although appointed to represent the child's best interests, *guardians* frequently find themselves acting as investigators for the court and mediators in addition to their ill-defined responsibilities as advocates. Lidman & Hollingsworth, *supra* note 545, at 256. Because of the various meanings invested in the term "*guardian ad litem*," some commentators argue that the term is essentially meaningless. *Id.* at 304-05. Others argue that to be effective, a *guardian ad litem* must incorporate a range of roles (champion, investigator and monitor). Muhlhauser, *supra* note 575, at 639.

<sup>604</sup> See HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE, *supra* note 561, at 6; Hill, *supra* note 547, at 618; Ventrell, *supra* note 112, at 269. See also Auclair v. Auclair 1999 Md. App. LEXIS 116, \*22-23 (1999) (explaining that although the child's preferences may, and should, be a part of the GAL's investigation, they are "but one fact to be investigated" and do not bind the GAL).

the ethical strictures do not apply.<sup>605</sup> More consensus exists about the lack of attorney/client privilege between GALs and children. In their reports to the court, *guardians ad litem* frequently provide information derived from their interactions with the child without the child's consent.<sup>606</sup> Despite the fact that communication is not privileged, however, the attorney/GAL is free to disclose the child's confidences only as necessary to carry out her investigation, to promote the child's best interest, and as required by law.<sup>607</sup> In assessing whether to disclose information, "the GAL must always accord the child respect and honor the child's autonomy as appropriate to the child's age and maturity."<sup>608</sup>

Proponents of the *guardian ad litem* model argue that children are not small adults and have needs and limitations that the traditional attorney/client model does not address. Appointing *guardians ad litem* is consistent with society's sense that children do not have all of the skills necessary for making autonomous decisions.<sup>609</sup> Children lack the maturity of judgment and cognitive capacity to assess their own interests and to appreciate the consequences of their decisions, especially in the long-term.<sup>610</sup> The GAL model also facilitates "positive paternalism," allowing for protection and oversight of the child.<sup>611</sup> Using the *guardian ad litem* model shields the child from the burden of having to make decisions or take positions in litigation and from the pressure to misidentify or misarticulate their interests.<sup>612</sup> Lawyers are especially well-suited to the *guardian ad litem* model given their skills as fact-finders and interviewers/counselors, and their ability to sort feelings from facts, to recognize gaps and inconsistencies in information, and to understand the legal process.<sup>613</sup>

Critics of the *guardian ad litem* model voice a number of concerns. First, the *guardian ad litem* model assumes that the attorney will articulate the "correct" viewpoint, that the attorney is well placed to determine what the child's best interest actually is.<sup>614</sup> But "[l]egitimate questions have been raised about the training and ability of attorneys to make independent best interests judgments . . .

<sup>605</sup> See Hill, *supra* note 547, at 626.

<sup>606</sup> See HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE, *supra* note 561, at 10; Lidman & Hollingsworth, *supra* note 545, at 269. GALs may also have the authority to waive the child's privilege regarding medical and mental health records over the child's objection. HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE, *supra* note 561, at 7.

<sup>607</sup> See Hill, *supra* note 547, at 618.

<sup>608</sup> *Id.*

<sup>609</sup> See *id.* at 623.

<sup>610</sup> See Buss, *supra* note 583, at 1702; HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE, *supra* note 561, at 6.

<sup>611</sup> See Hill, *supra* note 547, at 623; *New Directions*, *supra* note 362, at 13.

<sup>612</sup> See Buss, *supra* note 583, at 1703.

<sup>613</sup> See Hill, *supra* note 547, at 625.

<sup>614</sup> See Wilber, *supra* note 555, at 356.

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Others question whether the *guardian ad litem* is given disproportionate power in legal proceedings. Judges look for help in making decisions involving children; they want “outside, neutral, objective” persons to assist them in these cases and believe that *guardians ad litem* should perform that function.<sup>617</sup> This quasi-judicial status creates a “halo effect” around the *guardian ad litem*’s version of the facts, giving her presentation greater credibility than those of the parties.<sup>618</sup> In her role as a mediator, the presence of the *guardian* may create undue pressure on one party or the other to settle, as the parties sense the weight that the judge will give to the *guardian*’s recommendation.<sup>619</sup> In litigation, the *guardian* is treated as a party “plus,” permitted both to present a case and to state a position on the ultimate outcome.<sup>620</sup> More generally, the *guardian* enjoys the power associated with the role itself; most parties recognize that failure to comply with the *guardian*’s requests can turn the *guardian*, and therefore the court, against the party.<sup>621</sup>

Perhaps most importantly, the *guardian ad litem* model has the potential to disempower the child. The *guardian ad litem* is not an advocate for the child, but for the concept of the child’s interest (or, in the investigator role, for the truth.)<sup>622</sup> Although the *guardian ad litem* is said to give the child a voice in the proceedings, the child’s voice can and will be drowned out when the *guardian* believes that doing so is in the child’s best interests.<sup>623</sup> “[W]hat the child wants may be subordinated to some vision of the child’s best interests and to what is a ‘good’ or ‘right’ decision.”<sup>624</sup> As a result, “[t]he child is only heard if his viewpoint is consistent with that of his [*guardian ad litem*].”<sup>625</sup> The child is further disempowered if she believes that the attorney has been appointed to serve as her

<sup>615</sup> HARALAMBIE, THE CHILD’S ATTORNEY: A GUIDE, *supra* note 561, at 6.

<sup>616</sup> Lidman & Hollingsworth, *supra* note 545, at 276; *see also* HARALAMBIE, THE CHILD’S ATTORNEY: A GUIDE, *supra* note 561, at 12; Peters, *supra* note 576, at 1507.

<sup>617</sup> *See* Lidman & Hollingsworth, *supra* note 545, at 297.

<sup>618</sup> *See id.* at 279. The presentation, however, is colored by the GAL’s perspective on the case; the GAL is often permitted to testify to information about which she may not have personal knowledge and to assess the credibility of the information, a function that should rest with the finder of fact. *Id.* at 278-79.

<sup>619</sup> *See id.* at 283.

<sup>620</sup> *See id.* at 285-86.

<sup>621</sup> *See id.* at 286. Allowing the attorney to testify to the ultimate issue in the case by asserting an opinion as to the appropriate outcome also risks usurping the province of the finder of fact. Guggenheim, *Right to Be Represented*, *supra* note 548, at 102.

<sup>622</sup> *See* Guggenheim, *Right to Be Represented*, *supra* note 548, at 108.

<sup>623</sup> *See* Lidman & Hollingsworth, *supra* note 545, at 300.

<sup>624</sup> Federle, *supra* note 582, at 1656.

<sup>625</sup> Wilber, *supra* note 555, at 356.

voice, only to find that the attorney, acting as a *guardian ad litem*, has failed to zealously advocate her position.<sup>626</sup>

### 3. How Is Brad Better Served?<sup>627</sup>

The debate over the appropriate role for a child's representative reflects the tension between protecting children and respecting the rights and dignity of children as "developing human beings."<sup>628</sup> The debate also highlights society's ambivalence about empowering children, especially in ways that conflict with the power of parents.<sup>629</sup>

But how do competing theories of representation apply to one ten-year-old boy in the midst of family violence? Brad, the child first seen in the introduction, was given a representative by the court.<sup>630</sup> That representative was called a *guardian ad litem*, but was deeply conflicted about her role. Brad had clear views about what he wanted from the court: specific visitation, not to conflict with his other activities. And while the *guardian* understood what Brad wanted, she had concerns. The father was clearly mentally ill and taking medication that might impair his ability to care for the child, as well as inflame the violence that had touched Brad in the past. The *guardian* did advocate Brad's position, but with misgivings that were probably clear to the court. The system worked, however. The judge heard the evidence on mental illness from the mother, the father's desire for unfettered visitation, and Brad's request for somewhat more limited visitation, and provided visitation between father and son as soon as the father provided proof that he was in treatment and taking medication for his illness. No one voice drowned out any other, and a solution that all parties could live with was reached.

My understanding of my role as Brad's counsel *should* have turned what Brad had lost as a victim of family violence—his power. Brad had begun to stutter and was unsure of himself, behaviors that emerged after witnessing his father's mistreatment of his mother. Brad needed to know that his advocate was, in fact, his

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See Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the "Legal Ethics" Perspective*, 73 IND. L. J. 665, 672 (1998).

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This section will focus on a choice between the role of *guardian ad litem* and that of traditional attorney. But, as Ann Haralambie notes, "[i]t is futile to try to 'shoehorn' child advocacy standards into the traditional roles and rules." Haralambie, *Role of Child's Attorney*, *supra* note 557, at 947. Haralambie advocates for a hybrid role for representatives that addresses both the child's best interests and the child's wishes and integrates them into a recommendation for the court. She acknowledges that the ethical rules make such a stance problematic but believes that blending the roles is a "sensible" way of representing and protecting children. Haralambie, *The Child's Attorney: A Guide*, *supra* note 561, at 13, 37. Determining which role to play might also be a fluid concept, turning on which regime produces better outcomes for the child or is better suited to protecting the child's non-legal interests (for example, the child's psychological or emotional well-being). Green, *supra* note 626, at 671-72. In practice, moreover, the roles are probably far more intertwined than most advocates for either position would care to admit.

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Lyon, *supra* note 550, at 681; see also Hill, *supra* note 547, at 612.

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See William A. Kell, *Voices Lost and Found: Training Ethical Lawyers for Children*, 73 IND. L. J. 635, 635 (1998).

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advocate, arguing his position and expressing his needs. Safety and security are certainly important concerns for child victims of family violence, but empowerment is no less important for these children. And part of empowerment for these children is learning that violence is not the only means of resolving problems and that the court system can respond to conflict and provide acceptable solutions. Giving Brad a strong voice in the process and allowing him to see that his wishes and his desires were important and were valued was probably the best service I could have provided for him.

In cases involving family violence, children should have lawyers who exist only to advocate for their positions, to give them power in a process in which they are otherwise powerless, to impart a sense that violence is not the only way to resolve conflicts. Lawyers should be aware of their potential to dominate their child clients; in the counseling process, lawyers should work collaboratively, encouraging the child to reach his own decision by identifying alternatives and considering consequences.<sup>631</sup> When the child can voice a preference, including a preference not to be involved in the proceedings, the duty of the representative should be to forward that preference.<sup>632</sup> “[T]he point of client empowerment is not to make sure that the child client has made a good decision or the best choice; nor is it to ensure that the way in which she reached her decision is a reasoned one. Rather, by empowering the client, the lawyer ensures that the child, and no other, has truly made her own choice.”<sup>633</sup>

#### 4. Model Programs

Discussing which model of representation best serves children is academic if trained lawyers for children do not exist. Simply being a lawyer does not qualify an individual to advocate on behalf of a child. The role of the child advocate is to identify and argue for the needs of a particular child in a particular case, not for children generally, or even children at a particular developmental level generally.<sup>634</sup> In order to assess the child’s needs, child advocates should have training in child development<sup>635</sup>, children’s memory, the social and psychological needs of

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<sup>631</sup> See Federle, *supra* note 582, at 1691-92, 1695.

<sup>632</sup> Some would argue that it is naïve to think that the judicial system will reach the appropriate resolution, especially when children sometimes prefer to remain with the violent parent. See HARALAMBIE, *THE CHILD’S ATTORNEY: A GUIDE*, *supra* note 561, at 31. I acknowledge that in these situations, the principle of client-centered representation can and probably will fail some children because courts will not appropriately consider the violence and the danger to the child. Judicial education has been one of the consistent recommendations of this article, and is as important in supporting this principle as in other facets of family violence legal proceedings involving children.

<sup>633</sup> Federle, *supra* note 582, at 1696.

<sup>634</sup> See HARALAMBIE, *THE CHILD’S ATTORNEY: A GUIDE*, *supra* note 561, at 57. The attorney must be able to visualize the proceedings from the child’s perspective, incorporating the child’s sense of time, developmental needs, and individual needs, interests and desires. Haralambie, *Role of Child’s Attorney*, *supra* note 557, at 949.

<sup>635</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 103; Cervone, *supra* note 549, at

children,<sup>636</sup> interviewing and counseling children<sup>637</sup>, mediation, the effects of various forms of custody and visitation arrangements<sup>638</sup>, family violence<sup>639</sup>, and the role of race, culture, ethnicity and class in children's choices.<sup>640</sup> Representatives for children should understand the roles of social workers and psychologists and be open to collaborating with members of other professions and disciplines.<sup>641</sup> Serving as counsel for a child is comparable to representing a person of a different language or culture; the attorney must understand "differences in language, cognitive and experiential development" in order to "translate choices and options into language the child can understand, obtaining the aid of a therapist or child development specialist where necessary."<sup>642</sup>

A number of jurisdictions have developed programs to train lawyers in the skills needed to represent child clients. Although only a few directly address family violence cases specifically, and even fewer have chosen to represent children via the traditional attorney/client relationship, the models developed to train attorneys can be adapted and applied to the specialized representation of children in family violence cases.

One model of providing representation for children is through law school clinics. The Child Advocacy Clinic at the Indiana University School of Law—Bloomington represents children in paternity, guardianship, termination of parental rights and primarily, dissolution cases.<sup>643</sup> Although the clinic has chosen to represent children in custody proceedings as *guardians ad litem*, consistent with the law and practice in Indiana, the clinic clarifies, distinguishes and teaches different models for representing children.<sup>644</sup> When the clinic is appointed as the *guardian*

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11; HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE*, *supra* note 561, at 28; Ventrell, *supra* note 112, at 273.

<sup>636</sup> See Haralambie, *Role of Child's Attorney*, *supra* note 557, at 948.

<sup>637</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 103; Green & Dohm, *supra* note 583, at 1296.

<sup>638</sup> See Elrod, *supra* note 544, at 68.

<sup>639</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 103.

<sup>640</sup> See Green & Dohm, *supra* note 583, at 1296.

<sup>641</sup> See *id*; *Principles*, *supra* note 552, at 9.

<sup>642</sup> Elder, *supra* note 590, at 8.

<sup>643</sup> See Hill, *supra* note 547, at 605-06. Other law school clinics providing representation for children include the Child Advocacy Clinic at the University of Michigan School of Law, which focuses on child welfare cases, and the Loyola Child Law Center at Loyola University Chicago School of Law, which couples the nation's only comprehensive child law curriculum with a clinic providing legal services in abuse and neglect, delinquency and custody cases. AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW, *A JUDGE'S GUIDE TO IMPROVING THE LEGAL REPRESENTATION OF CHILDREN* 89-90 (Kathi L. Grasso, ed., 1998) [hereinafter *JUDGE'S GUIDE*].

<sup>644</sup> See Hill, *supra* note 547, at 611. One obvious problem with choosing to serve as *guardian ad litem* is that the child lacks legal representation in the proceedings. Green, *supra* note 626, at 666. Another is that although the students develop good listening skills, they fail to develop the ability to translate what they have heard from the client into an advocacy position. The child's position, where not "rational" or consistent with the *guardian ad litem*'s sense of the case, can be dismissed as evidence that the child is not competent to

*ad litem* for a child, a team of students is assigned to the case. One student acts as the *guardian ad litem*, investigating, interviewing and making a recommendation; the other student files her appearance as counsel for the *guardian ad litem* and performs the traditional legal work (filing, research, communication with opposing counsel, negotiating, trial appearances) required in the case.<sup>645</sup> Both law and social work students participate in the clinic, and the clinic is staffed by social workers and supervising attorneys who oversee the cases.<sup>646</sup>

The strengths of this approach are numerous: the availability of interdisciplinary resources both within the clinic and in a university setting generally<sup>647</sup>, the engagement of the law students, the strength of the mentoring and support provided for the students, the lasting commitment to child advocacy that the clinical program fosters. The weaknesses include the small number of cases such a clinic can handle and the potential for a great deal of turnover, creating distress for a child who is constantly meeting her "new" attorney. Nonetheless, law school clinical programs could serve as one source of representatives for children in family violence cases.

*Pro bono* projects can also increase the pool of representatives for children. Perhaps the best model for this type of endeavor is the "Representing Children in Restraining Orders Court *Pro Bono* Project" of the Rocky Mountain Children's Law Center. The Project, which represented 174 children in 1996-97, pairs *pro bono* attorneys acting as *guardians ad litem* with children whose parents are involved in domestic violence restraining order proceedings.<sup>648</sup> Volunteer attorneys receive continuing legal education credit for the Project's required one-

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make decisions in her own interest. Kell, *supra* note 629, at 655. Although I prefer a different model of representation than the clinic uses, the clinical program could just as easily train lawyers for children, and is therefore worth considering here.

<sup>645</sup> See Hill, *supra* note 547, at 606-07. This structure essentially detaches the advocacy from the decision regarding the position to advocate. See Green, *supra* note 626, at 666.

<sup>646</sup> See Hill, *supra* note 547, at 607-08.

<sup>647</sup> In representing children, interdisciplinary work is crucial. For that reason, "*guardian ad litem*" teams consisting of social workers, psychologists and attorneys are being proposed. The team would have the opportunity to review, discourse, share knowledge and bring their different skills to the representation of the child and could add members as needed, depending on the facts of the particular case. Creating multidisciplinary teams also reduces the opportunity for bias and increases the likelihood that cultural factors and different philosophies will be considered by the advocate. Tara Lea Muhlhauser & Douglas D. Knowlton, *The "Best Interest Team": Exploring the Concept of a Guardian ad Litem Team*, 71 N.D. L. REV. 1021, 1023-26 (1995).

<sup>648</sup> See Rocky Mountain Children's Law Center, *Rocky Mountain Children's Law Center Pro Bono Attorney Project: Pro Bono Conference, Friday, March 27, 1998* at 1, 4 [hereinafter *Rocky Mountain*]. The Project's materials state that it is the "first and only program to provide legal representation to children in domestic violence cases involving parents seeking restraining orders." *Id.* at 1. However, Chicago's Sidley & Austin initiated a small program providing *guardian ad litem* representation for children of the parents in domestic violence cases in Cook County, Illinois, in 1990-91. "Although no formal study was done on the effectiveness of the Sidley & Austin pilot program, it was deemed a huge success by the children, families and attorneys, as well as the participating court." Murphy, *supra* note 576, at 300. In a similar program, Utah's Office of the *Guardian ad Litem*, a branch of the state judiciary, co-sponsored a project that trained approximately two hundred attorneys to serve as *guardians ad litem* in contested custody and visitation cases. JUDGE'S GUIDE, *supra* note 633, at 81-82.



day training, which includes information on the dynamics of domestic violence, Colorado's domestic violence laws, child development, the role of the *guardian ad litem*, and community resources.<sup>649</sup> Center staff provide support for volunteer attorneys,<sup>650</sup> and assemble *pro bono* interdisciplinary teams of social workers, psychologists, and pediatricians to work with volunteer attorneys on a case-by-case basis.<sup>651</sup> The Center also helps volunteer attorneys to secure needed services, including substance abuse counseling, domestic violence services and batterer's treatment, for families.<sup>652</sup> Cases are referred to the Center by judges hearing Domestic Abuse Act proceedings; judges are more likely to seek representation for children when there are allegations of verbal, physical, or sexual abuse or neglect toward the child, when the child has been involved in the violent incident, when the child is exhibiting "red flag" behavior (for example, running away), or when the judge is uncertain that the nonviolent parent can protect the child from violence.<sup>653</sup>

The strength of the Project lies largely in the commitment of the attorneys—volunteer lawyers spent an average of twenty hours per case, logging fifty to one hundred hours on some cases, and chose to continue working on eighty-two percent of the cases that went beyond the restraining order court<sup>654</sup>—and the support of the Rocky Mountain Children's Law Center, which provides volunteers with training materials, links to community resources and access to other child-serving professionals.<sup>655</sup>

The District of Columbia Bar Public Service Activities Corporation also trains volunteer attorneys to serve as *guardians ad litem* in cases involving family violence.<sup>656</sup> The first training was held in 1997, after public interest attorneys with

<sup>649</sup> See Rocky Mountain, *supra* note 648, at 2.

<sup>650</sup> See *id.*

<sup>651</sup> Remarks of Shari Shink, Director, Rocky Mountain Children's Law Center, American Bar Association *Pro Bono* Conference (March 27, 1998).

<sup>652</sup> See Rocky Mountain, *supra* note 648, at 2.

<sup>653</sup> See *id.* at 2-3. The last criterion raises concerns about the chilling effect of providing representation for children. If battered mothers know that their conduct as parents will be scrutinized by the restraining order court, and could in fact lead to the institution of an action for failing to protect their children from the batterer's violence, they will be less likely to seek protection for themselves and their children. Projects providing representation for children must emphasize the dynamics of domestic violence in their training and sensitize their volunteer attorneys. The Center acknowledges this problem, but found "[a]s stated by one battered women's advocate, 'A good guardian can be a good advocate for the women,'" at least where the woman's interest is consistent with the child's. *Id.* at 5. I have certainly found this to be true in my practice as a *guardian ad litem*.

<sup>654</sup> See *id.* at 2.

<sup>655</sup> Child advocacy law offices may be the most efficacious model for providing representation to children: there is greater uniformity in the selection, training, and supervision of staff; they can expertly handle a greater number of cases; and they can take individual cases and translate them into opportunities for systemic reform. JUDGE'S GUIDE, *supra* note 643, at 71. As the Center notes, however, few communities have children's law centers. Rocky Mountain, *supra* note 648, at 5.

<sup>656</sup> This section is largely based on my experience as the chair of the *guardian ad litem* training. As in Indiana, we train attorneys to serve as *guardians ad litem* because both local law and the judges prefer this type of representation. Guggenheim, *Making of Standards*, *supra* note 548, at 38 (American Academy of

experience as *guardians ad litem* in family violence cases became concerned about the disproportionate number of cases they were being asked to handle. We began looking for ways to increase the pool of lawyers serving in this capacity without compromising the quality of the representation. After two years, approximately thirty additional attorneys are volunteering to represent children in family violence cases. The training focuses heavily on issues of role conflict, child development, domestic violence dynamics, and interviewing and counseling children. Mentors (generally the trainers) are available to assist new attorneys with questions arising out of the representation. A few of the attorneys trained in the program have become mentors within their own firms, encouraging and supporting other attorneys who take the training. Judges refer cases to local legal services providers, who place the cases with volunteer attorneys. Representatives for children are appointed in civil protection order, divorce, custody and visitation disputes.

Has the program been successful? Certainly we have increased the pool of volunteer attorneys available to represent children in family violence cases, although some battered women's advocates have expressed concern about the lack of sensitivity of some of the *guardians* to the dynamics of domestic violence. The judges have been supportive, but some are resistant to the idea that children need representation; even in cases where the parents insist that their children have strong desires one way or the other, judges are not always willing to give those desires an independent voice. We are constantly reevaluating the training, seeking to provide more insight into working with children in an empowering way.

In the absence of public funding for representatives for children, law school clinics and *pro bono* projects are two of the best ways to increase the pool of attorneys available to advocate for children. Judges, advocates, law school faculty and administrators and other professionals should work together to create, support and refine such programs in their communities. In a system where the only voice available to the child is through an advocate, we must ensure that such advocates exist.

One way of affirming the child's personhood is through representation in the legal system. Another is by directly addressing the emotional and psychological scars caused by family violence. The next section will examine programs helping children to cope with family violence and consider how such programs should be provided.

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Matrimonial Lawyers Standards are advisory; where they conflict with local laws, judges and attorneys must follow the local law). I must admit that when I began the training, I did not have the same philosophical misgivings about serving as a *guardian ad litem* that I now face. As of late, I have taken the pragmatic approach that if we did not accept appointments as *guardians ad litem*, children would not be represented in these matters at all. I have tried to advocate for the child's wishes and to avoid making recommendations whenever possible, following the advice that even when appointed as a *guardian ad litem*, the attorney should, to the greatest extent possible, serve as she would if appointed as a lawyer for the child. Green & Dohm, *supra* note 583, at 1295. We have also incorporated this principle into our training, spending a great deal of time discussing role issues and urging attorneys to act as advocates for the child in the traditional sense whenever possible. I thank Matt Fraidin, legal director of the Children's Law Center, for helping me think through these difficult issues.

C. *Counseling Services for the Child*

Emphasizing the need for counseling for the child brings this article full circle. The article began with a discussion of all of the horrors inflicted on children who witness domestic violence; it ends with a consideration of how to counteract that damage.

Clinical intervention can reduce the short and long term effects of witnessing domestic violence and can reduce the likelihood that children will be victimized as adults.<sup>657</sup> Through intervention, children improve their self-esteem, their ability to develop trusting relationships, and their ability to act appropriately in social situations. They are less likely to suffer from somatic complaints. They learn techniques for non-violent conflict resolution and to reject violence as a means of dispute resolution.<sup>658</sup> Given the obvious benefits, children who witness family violence should receive specialized mental health services and social service intervention.<sup>659</sup> Yet anecdotal evidence suggests that child witnesses are not being evaluated to assess their need for services and are not receiving needed services.<sup>660</sup>

The goal of therapy for child witnesses of domestic violence is to help them to cope with the confusion and terror that arise from violent incidents and their aftermath. In working towards that goal, counselors should seek to establish a safe environment, with stability and structure, for the child; to reduce the child's isolation and sense of responsibility and give the child a sense of control; to help the child to realize that she cannot change her parents' behavior; to develop the child's capacity to express anger constructively; to teach problem solving, coping mechanisms and social skills; and to provide information and education on the cycle of power and control.<sup>661</sup> Most programs help children to identify and express their feelings honestly, to improve their self-esteem, to develop personal protection and safety plans, and to focus on the feelings of grief and loss engendered by the violence.<sup>662</sup> Effective interventions are culturally competent, take into account the child's specific needs, avoid subjecting children to further trauma through repeated descriptions of abuse, and are designed to prevent harm to the child by minimizing

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<sup>657</sup> See Tomkins, *supra* note 24, at 154. The duration of the therapy should turn on the age, the health and the mental health status of the child prior to the abuse, the number and forms of previous victimization and the type of violence to which the child was exposed. AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 64. See generally BETSY MCALISTER GROVES, *Mental Health Services for Children Who Witness Domestic Violence*, THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 122 (1999).

<sup>658</sup> See Tomkins et al., *supra* note 24, at 154-55.

<sup>659</sup> See *id.* at 141.

<sup>660</sup> See *id.* at 141-42. Because victims of violence may have psychological reasons to ignore their children's responses or underestimate their vulnerability, service providers should not rely on battered women to report their children's problems. *Id.* at 162. Moreover, providing services for the children of victims may not be a priority for agencies serving battered women, especially when helping the child witness means interfering with the empowerment of the adult victim. *Id.* at 168, 177-78.

<sup>661</sup> See Eena R. Bass-Feld, *The Impact of Domestic Violence on Children* (found December 17, 1998) <<http://www.wrc-gbmc.org/Articles/violence2.html>>

<sup>662</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 71.

the child's exposure to additional violence.<sup>663</sup> Treatment modalities include play therapy, which allows children to express their feelings using a variety of props, including dolls, puppets and stuffed animals.<sup>664</sup> Children also learn to express their emotions and handle trauma symbolically through art and music projects.<sup>665</sup> Behavioral therapy can help to reduce the symptoms associated with witnessing violence.<sup>666</sup> Parents should be encouraged to initiate treatment and should have ongoing communication with the therapist, especially when the child is visiting with the batterer.<sup>667</sup>

Donald and Demetrius, the children described earlier, were fortunate that in the District of Columbia, the court system has recognized the centrality of treatment for child witnesses. The District of Columbia Superior Court's Domestic Violence Unit is closely connected with two programs providing counseling for children.<sup>668</sup> The Children of Violent Environments (COVE) Program is housed within the District of Columbia Superior Court Social Services Division's Family Counseling Program. The program is staffed by family counseling probation officers, probation assistants, parent/community partners, and graduate interns in social work and counseling. Children who have witnessed domestic violence and/or suffer from the effects of the violence are referred to the program by judges in the Domestic Violence Unit of the Superior Court. Program counselors visit with children and families in their homes for sixteen weeks of play therapy (which can be extended upon the agreement of the counselor and family) and run ten week group sessions for children involved in the program. Parents are frequently referred to the "Parents Empowering Parents" groups taking place at the same time as the children's groups. Counselors assess the child's need for and make recommendations about long-term therapy, but do not conduct individual therapy themselves.<sup>669</sup> Counselors are available (albeit reluctant) to testify on behalf of the child in domestic violence, custody and visitation cases. The strength of COVE is its direct tie to the court system; referrals can be made immediately upon leaving

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<sup>663</sup> See *id.* at 61-62.

<sup>664</sup> See *id.* at 70. The Child Witness to Violence Program housed at Boston City Hospital seeks to identify children traumatized by acts of domestic violence and provides developmentally appropriate counseling, using play therapy, for the children. Augustyn et al., *supra* note 7, at 36.

<sup>665</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 71.

<sup>666</sup> See *id.*

<sup>667</sup> See *id.* at 71.

<sup>668</sup> Two local battered women's service providers, House of Ruth Counseling Center and the S.O.S. Center, also provide services for child witnesses but have not been as closely affiliated with the court.

The widely acclaimed court programs in Dade County, Florida, and Quincy, Massachusetts, both connect children with referrals to mental health services. The Dade County court, in conjunction with a local medical center, provides free counseling to children aged 5-15 for ten weeks. DAVIDSON, IMPACT, *supra* note 24, at 6-7. In Quincy, children needing legal or mental health assistance are provided with referral services. Salzman, *supra* note 42, at 340.

<sup>669</sup> Information about COVE provided in a presentation by Dorothea A. Walker, LPC, LICSW, Supervisor of the Family Counseling Program, October 7, 1998 (written materials on file with the author).

the courtroom, facilitating the process for the custodial parent. In the past, COVE has had problems with waiting lists and with an inability to serve non-English speaking children, although both of those problems vary with the number of referrals and the current contractors. After working with a COVE counselor, Donald and Demetrius, and their mother, who became a parent counselor, were able to confront their feelings about their father and express them constructively.

Resilience Works, Inc., is a newer program available to child witnesses to domestic violence. Recognizing that children are "co-victims" exposed to domestic violence, the United States Attorney's Office partnered with the National Institute of Justice, the Executive Office of Weed and Seed and the directors of the project, Drs. Hope Hill and Howard Mabry, to provide free counseling services to children aged six to sixteen. The project runs groups for children on Friday, Saturday and Monday afternoons (because weekends are the times of greatest violence). The groups run for twenty-four week sessions, and individual therapy is also provided for a number of the children. Parent participation is expected; parent groups last for ten weeks. Resilience Works provides transportation for children and families to and from the sessions, which are based in community locations. Referrals come from various court personnel: judges in the Domestic Violence Unit, the Domestic Violence Intake Center, the court's mediation services, and private attorneys.<sup>670</sup> As of June 1999, forty-four children had been referred to Resilience Works; nineteen were actively participating.<sup>671</sup>

Although these projects operate from different institutional bases, they share a common goal: addressing the impact of violence on children at the earliest possible stage. They also share one important feature—close ties to the judicial system. Unfortunately, but realistically, many child witnesses to domestic violence are first identified when their parents engage the court system. Courts are uniquely placed to recognize and refer these children, but only if such referrals are available. By creating in-house counseling programs and/or partnering with programs in the community, courts can ensure that children have access to needed mental health services. When intervention services are publicized and easily accessible, families are more likely to use them.<sup>672</sup> Making referrals through the court meets both

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*See Child Witnesses to Domestic Violence; Protocol for Referrals to Resilience Works, Inc. From Court and Community Agencies* (on file with the author).

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*See Children as Witnesses to Domestic Violence: Intervention to Break the Cycle and Heal the Pain*, June 16, 1999 report to the Advisory Council for Resilience Works (on file with the author). The children assessed by the program have been found to suffer from attention deficit/hyperactive disorder, post-traumatic stress disorder, conduct disorders and separation anxiety. Parents assessed by the program are struggling with post-traumatic stress disorder, major depression and substance abuse issues. *Id.* Given the large number of three-year olds who have been referred and the lack of services in the city to serve children that young, the program is considering how to incorporate an early childhood component.

Since the end of the first grant period, Resilience Works, Inc., has decided to continue its operations independent of the U.S. Attorney's Office.

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*See* AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 3, at 62. The APA also recommends developing programs within public schools to detect and intervene in cases of family violence. Ideally, such programs would train teachers to recognize the violence, develop components for student consideration of family violence issues, and provide services and referrals for children who are identified as witnesses to or

criteria.

Restoring a child's self-esteem, teaching a child to manage conflict, preventing a child from becoming an adult victim—these are all essential elements in recognizing and fostering the child's personhood. The court system should be no less concerned with enhancing this component of the family violence system than with the traditional litigation components discussed previously. Courts that truly care about addressing the cyclical nature of family violence should create the linkages that will provide children with mental health services.<sup>673</sup> By providing a child with a voice and with the tools to use that voice in a non-violent, confident manner, the legal system would do much to prevent the next generation from suffering as this one has.

## VI. CONCLUSION

The legal system must ensure that children living with family violence receive the help they need in order to avoid perpetuating the cycle of violence so harmful to families and society as a whole.<sup>674</sup> Even in a system where children are still largely treated as property, family violence skews the ordinary calculations; enforcing custody and visitation laws and creating safe alternatives for visitation ease the child's transition from a home fraught with violence to the redevelopment of a relationship with an abusive parent. Creative use of evidence law can shield children from the trauma of testifying. When they do testify, attending to their unique needs as witnesses will prevent further victimization of children already in the untenable position of testifying against a parent. Finally, providing advocates and mental health services for children will help to ensure that a system that too often ignores them will pay special attention to children as people in their own right. The legal system's past neglect of children from violent homes is already evident in the one-time child witnesses who are the plaintiffs and defendants in current family violence cases; our responsibility as members of that system is to stop the cycle now.

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victims of family violence. *Id.* at 128.

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Although courts have a unique opportunity to provide family violence services, they are certainly not the only state actors with a responsibility to do so. In Nebraska, for example, the Protection From Domestic Abuse Act requires the Department of Health and Human Services to provide services for children of domestic violence survivors, and specifically mentions "counseling for trauma which occurs when children witness or experience violence," as a service that the Department could provide. NEB. REV. STAT. § 42-910 (1998).

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See Crosby, *supra* note 2, at 505.